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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
PETITIONER,

vs.

SOPHIA C. BACHMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1931

CERTIORARI GRANTED OCTOBER 26, 1931

(36,125)

(36,125)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from district court of the United States, Northern West Virginia	1	1
Caption (omitted in printing)	1	
Declaration	1	1
Policy of insurance	2	1
Defendant's general issue plea	11	11
Plaintiff's joinder in general issue plea	12	11
Specifications of defense	12	11
Plaintiff's reply to specifications of defense	17	15
Order, impaneling jury, and commencing trial	19	17
Order, trial continued, and directed verdict for plaintiff refused	20	18
Order, testimony completed, motion for directed verdict, and plaintiff's motion withdawn	21	19
Order, verdict of jury rendered	22	20
Final judgment order	22	20
Defendant's bill of exceptions	23	21
Caption	23	21

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1931

	Original	Print
Stipulation as to judgment, etc	23	21
Testimony of Charles F. Bachmann	24	22
Exhibit 2—Proof of loss	25	23
Exhibit 1—Lease, Charles F. Bachmann to Bill Varisca	33	31
Testimony of George A. Hastings	42	40
W. L. Smith	44	42
Mrs. Ella Weidner	47	46
Elmer Faddis	49	47
Mrs. August W. Forsch	50	48
Mr. August W. Forsch	51	49
George B. Heide	52	50
J. J. Doerr	59	56
George J. Kossuth	62	60
Alonzo Prince	63	61
Samuel Morris	79	77
Alonzo Prince (recalled)	86	83
Charles F. Bachmann (recalled)	88	85
J. J. Doerr (recalled)	90	87
A. S. Whitely	91	88
David Tyler	93	90
James J. Maloney	96	92
Ashby Jackson	98	94
Elmer Faddis (recalled)	101	97
Charles Miller	101	98
William B. Casey	103	99
Louis Brown	103	99
Joseph P. Shaughnessy	104	101
Stephen Wall	105	101
William Gutman	106	102
William Schell	109	105
Edward F. Deihl	109	106
W. Barclay Johnson	111	107
Frank Schirripa	112	108
David A. McKee	113	109
H. L. Kirk	113	109
E. W. Exley	115	112
William Jasper	116	112
George H. Miller	117	113
Edward Bachmann	118	114
John Brewster	120	116
Edward T. Rose	121	117
Doctor R. J. Hersey	123	119
Ralph W. Snyder	125	121
M. C. Kindleberger	126	121
Ashby Jackson (recalled)	127	122
Ira P. Huff	129	125
Emil Stumpp	135	130
Charles C. Coleman	135	130
Carl G. Bachmann	135	131
Charles F. Bachmann (recalled)	137	132

	Original	Print
Testimony of Samuel Morris (recalled)	139	135
Russell L. Furbee	142	137
Motions to exclude certain testimony, etc	143	138
Plaintiff's requested instructions	144	140
Defendant's requested instructions	156	148
Charge to jury	157	152
Plaintiff's exceptions to charge	159	154
Defendant's exceptions to charge	160	155
Verdict	162	157
Motion for new trial	162	157
Order settling bill of exceptions	162	157
Order filing bill of exceptions	163	158
Order re original exhibits	164	159
Assignments of error	165	159
Memorandum under Sec. 7 of Rule 14 of C. C. A.	178	172
Stipulation under Rule 23 of C. C. A.	179	173
Præcipe for record	179	173
Clerk's certificate (omitted in printing)	181	
Proceedings in United States circuit court of appeals, fourth circuit	183	175
Minute entries	183	175
Opinion, Northcott, J.	185	176
Judgment	190	180
Petition for rehearing (omitted in printing)	191	
Order staying mandate	214	181
Order denying rehearing	215	181
Order staying mandate	216	182
Clerk's certificate (omitted in printing)	216	
Order allowing certiorari	217	182

[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

In Assumpsit. Law No. 360

SOPHIA C. BACHMANN, Plaintiff,

versus

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Defendant

DECLARATION—Filed May 25, 1926

The plaintiff, Sophia C. Bachmann, a citizen and resident of the State of West Virginia, complains of St. Paul Fire & Marine Insurance Company, a corporation, duly organized and existing under the laws of the State of Minnesota, and a citizen of said State of Minnesota, and having its principal office in the City of St. Paul, Minnesota, in said state, which has been summoned to answer this: For that the defendant, by virtue of the policy of insurance, a copy of which is herewith filed, owes Four Thousand ($4,000.00) Dollars, to the plaintiff for loss in respect to the property insured by said policy, caused by fire on or about the 27th [fol. 2] day of December, in the year 1925, at No. 1312 Main Street, in the City of Wheeling, County of Ohio and State of West Virginia.

Sophia C. Bachmann, by Carl G. Bachmann, Handlan, Garden & Matthews, Her Attorneys. Carl G. Bachmann, Handlan, Garden & Matthews, Attorneys for Plaintiff.

POLICY OF INSURANCE—Filed May 25, 1926 as part of Declaration

Saint Paul Fire and Marine Insurance Company, Saint Paul, Minnesota

Incorporated 1865

No. 7040

Amount: $4,000.00. Rate: 2875. Premium: $115.00

In Consideration of the Stipulations herein named and of One Hundred and Fifteen and 00/100 Dollars Premium

Natural Gas Permit

Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions:

This company will not be liable for damage by explosion of Natural Gas on the premises unless fire ensues, and then for damage by fire only.

Caution.—The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stove-pipe provided with dampers to prevent over-heating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose [fol. 5] key to be hung up out of reach of children. Beware of leaks in pipes.

Lightning Clause and Electrical Apparatus Clause

(Excluding Damage to Dynamos and Other Electrical Apparatus

This policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term "lightning", and in no case to include loss or damage by cyclone, tornado or wind-storm) whether fire ensues or not; it being made a condition of this contract that any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged, this Company shall be liable only for such proportion of any direct loss or damage by lightning (except as above stated) as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

Permission is herby given to use electricity for light.

Attached to and forming a part of Policy No. 7040 of the St. Paul Fire & Marine Ins. Co., St. Paul, Minn., is-

sued through the Minnesota Underwriters' Agency, —— Insurance Company of ——.

Alex R. Campbell & Co., Agents.

8-23-50M.

Mrs. Sophia C. Bachmann.

Form No. 4

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 On four story brick building, with approved [fol. 6] roof, and its additions adjoining and communicating, occupied as Produce Store, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situate 1312 Main St., Wheeling, W. Va.

It is understood and agreed that this does not cover the foundations below ground level.

Other insurance permitted.

Privileges Granted

Note by District Clerk.—For privileges granted see page 3 of this transcript.

Provisions Required by Law to be Stated in This policy.—This policy is in a stock corporation, and is issued under and in pursuance of the laws of the State of Minnesota relating to Guaranty Surplus and Special Reserve funds.—Chapter 437, General Laws of 1909.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

In witness whereof this Company has executed and attested these presents.

T. R. Bigelow, President. A. W. Perry, Secretary.

Countersigned at Wheeling, W. Va., this 12th day of February, 1924.

Alex R. Campbell & Co., Agent.

[fol. 7] Fraud, Misrepresentation, etc.—This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and Excepted Property.—This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not Covered.—This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto.

Ownership, etc.—(a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring.

Other Insurance.—(a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of Hazard:—(b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc.—(c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, Gas, etc.—(d) while illuminating gas or vapor is generated, on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises: fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

[fol. 8] Factories.—(e) if the subject of insurance be a manufacturing establishment while operated, in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.—(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning.—(g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel Mortgage.—Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of Building.—If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses.—The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any

other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver.—No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of Policy.—This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

[fol. 9] Pro Rata Liability.—This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon.—The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage Interests.—If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bring-

ing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as the mortgagor or owner, no liability existed, it shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in Case of Loss.—The insured shall give immediate notice, in writing, to this Company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein [fol. 10] described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may

be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's Options—Abandonment.—It shall be optional with this Company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to this Company of any property.

When Loss Payable.—The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss or damage is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.—No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation.—This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

[fol. 11] Standard Fire Insurance Policy of the State of New York. Expires February 14, 1927. Property: Building. Amount: $4000.00. Premium: $115.00. Mrs. Sophia C. Bachmann. No. 7040. St. Paul Fire and Marine Insurance Co., St. Paul, Minn. Issued through the Minnesota Underwriters Agency. Alex R. Campbell & Co., Agents, 421 Wheeling Bank & Trust Bldg., Wheeling, W. Va. It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

In United States District Court

Defendant's General Issue Plea—Filed August Rules, 1926

Now comes the defendant, by Steptoe, Maxwell & Johnson, and Russell L. Furbee, its counsel, and defends the wrong and injury when, etc., and says that it is not liable to the plaintiff as she hath in her declaration alleged. And of this the defendant puts itself upon the country.

Steptoe, Maxwell & Johnson, Russell L. Furbee,
Attorneys for Defendant.

[fol. 12] In United States District Court

Plaintiff's Joinder in General Issue Plea—Filed Sept. 24, 1926

The said plaintiff as to the "statutory general issue plea" by the said defendant in this action pleaded, and whereof it hath put itself upon the country, doth the like.

Carl G. Bachmann and Handlan, Garden & Matthews,
Attorneys for Plaintiff.

In United States District Court

Specifications of Defense—Filed October 2, 1926

The defense in this action being, with other things, that the action cannot be maintained because of the plaintiff's failure to perform and comply with, and her violation of, certain clauses, conditions and warranties contained in the

policy sued upon herein, and in the paper attached and annexed to and by reference made a part of said policy, this defendant hereinafter specifies the particular clauses, conditions and warranties in respect to which such failures and violations are claimed to have occurred:

I

The policy upon which this action is based contains the following condition and warranty:

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured."

The defendant says that at and before the time of the fire complained of, the fire hazard upon the insured building was greatly increased by divers means within the knowledge and control of the plaintiff and her agent or agents, and in at least three separate and distinct particulars, each and all of which, both separately and as a whole, consti- [fol. 13] tuted a violation of the above quoted condition and warranty, as herein below set forth, to-wit:

(a) Some time prior to said fire, to-wit, about the first day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent or agents, to one Bill Varisca, for a certain term, to-wit, eighteen months; that at the time of the fire, and prior thereto, said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquors; that the operation of said stills upon said premises was in express violation of the prohibition and other laws of the United States, as well as of the State of West Virginia, and thereby subjected the said Bill Varisca and his associates, in case of discovery, to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner, and for the most part during the night time, with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning

thereof, and for the extinguishment of the same, could not and would not be used by the said occupants of the building; and that, in many other ways, said unlawful, illegal, and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained of herein, all of which was then and there known to the plaintiff and her agent or agents.

(b) The defendant further says that the moonshine still or stills aforesaid were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible, and explosive substances used in and about their operation; that especially, the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom; and that the fire hazard to the insured building was greatly increased thereby, and in fact caused or contributed to the fire herein complained of, all of which facts were within the knowledge and control of the plaintiff and her agent or agents.

[fol. 14] (c) In connection with the operation of said moonshine still or stills, said Bill Varisca and his associates necessarily used large quantities of gasoline, mash, and other highly combustible, inflammable, and explosive substances, as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the insured building, and directly caused or contributed to the fire of which the plaintiff complains in this action. The defendant further says that the plaintiff, and her agent or agents, had knowledge and control of such increased hazard at and before the time of the fire.

II

The following condition and warranty is also found in said policy:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occur-ing (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, gasoline, nap-tha or

does insure Mrs. Sophia C. Bachmann and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of Three (3) Years from the 14th day of February, 1924, at noon, to the 14th day of February, 1927, at noon, against all direct loss and damage by fire and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding Four Thousand and 00/100 Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper [fol. 3] place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

Endorsement blank: Minnesota Underwriters' Agency of the St. Paul Fire and Marine Insurance Company. Name of Assured: Mrs. Sophia C. Bachmann. Copy of Endorsement made and agreed to on the 9th day of April 1925. It is hereby understood that rate has been changed on property covered under below mentioned Policy, from $2.28 to $2.075 for three years, thereby making a return premium of $19.67. Old Rate: $2.88. New Rate: $2,075. Additional Premium: $—. Return Premium: $19.67. Attached to and forming part of Policy No. 7040 of the Wheeling Agency of the Minnesota Underwriters' Agency of the St. Paul Fire and Marine Insurance Company, St. Paul, Minn. Alex R. Campbell & Co., Agent. If assignment, is it upon actual sale? ——. Cash value of property insured: $——. If mortgaged, state amount: $——. Value of entire property mortgaged: $——.

Form No. 4

Substituted Form V

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every descrip- [fol. 4] tion and electrical equipment for lighting and elevator service, and on all permanent fixtures thereon, situate at No. 1312 Main Street, Wheeling, W. Va.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than 10 feet from artificial light, except incandescent electric light; for other insurance without notice until required; to be vacant not exceeding sixty (60) consecutive days; to be unoccupied not exceeding sixty (60) consecutive days; to make ordinary alterations and repairs in the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein, or adjacent, and such alterations; to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions; and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels."

The defendant says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty.

III

The following condition and warranty is also contained in the policy sued upon herein:

"This entire policy shall be void if the insured has con- [fol. 15] cealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The defendant says that on or about the 17th day of February, 1926, there was forwarded by the plaintiff to the defendant a paper purporting to be a proof of loss in connection with the fire herein complained of, which paper was signed by the plaintiff and sworn to and acknowledged by her before one J. Wilbert Johnson, a Notary Public in and for Ohio County, West Virginia. The above quoted condition and warranty was violated by the sworn statements made by the plaintiff in said paper, in at least two separate and distinct instances, to-wit:

(a) Said paper contained a sworn statement by the plaintiff to the effect that the insured building was being occupied at the time of the fire for "mercantile purposes by Bill Varisca, and for no other purpose whatever." The defendant says that said statement was false and untrue, as the plaintiff well knew, and was made for the purpose of deceiving and defrauding this defendant. The defendant says that, in fact, the insured building was being occupied at the time of the fire by Bill Virsca (or Varisca) and his associates, not for mercantile purposes, but for the purpose of

operating one or more moonshine stills for the manufacture of intoxicating liquor, and for other illegal and unlawful purposes, of all which the plaintiff and her agent or agents had knowledge.

(b) In said paper, the plaintiff made a sworn statement to the effect that the origin of the fire complained of was "unknown." The defendant says that, as a matter of fact, and as the plaintiff and her agent or agents well knew, said fire originated on account of the illegal and highly dangerous uses being made of the insured building by the plaintiff's tenant, Bill Varisca, and his associates, which said uses of the premises were within the control and knowl-
[fol. 16] edge of the plaintiff and her agent or agents; and that said false and misleading sworn statement was deliberately made by the plaintiff for the purpose of deceiving and defrauding this defendant.

And so the defendant says that, by reason of the plaintiff's violation of and failure to comply with the several clauses, conditions and warranties hereinbefore specified, and each and all of them, the policy sued upon has been rendered null and void, and the plaintiff cannot recover in this action.

St. Paul Fire & Marine Insurance Co., by Counsel.
Russell L. Furbee, Steptoe, Maxwell & Johnson, Counsel.

Duly sworn to by James M. Guiher. Jurat omitted in printing.

[fol. 17] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REPLY TO SPECIFICATIONS OF DEFENSE—Filed Nov. 7, 1929

No. 1

Plaintiff answering defendant's Specifications of Defense No. 1 (a), No. 1 (b) and No. 1 (c) for answer says, that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said Specifications; that neither she nor her agent or agents had any knowledge or control of, over or concerning any of said

facts, charges and allegations. Plaintiff replying further says that added and attached to and made a part of the policy of insurance sued upon herein is a certain agreement in writing (commonly called a rider) which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is of the following tenor:

"Form No. 4

Sophia C. Bachman

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters Association)

Substituted Form

NOTE BY DISTRICT CLERK.—See page 3 of this transcript.

And for further answer and reply to said Specification No. 1 (a), No. 1 (b) and No. 1 (c), the said plaintiff joins issue thereon.

No. 2

For answer to the defendant's Specification of Defense No. 2, plaintiff says that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said specification; that neither she nor her agent or agents had any knowledge or control of over or concerning said facts, charges and allegations nor of any increased hazard at or before the time of the fire. Plaintiff replying [fol. 18] further says that added and attached to and made part of the policy of insurance sued upon herein is that certain agreement in writing (commonly called the rider), which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is set out in extenso in plaintiff's answer to Specification No. 1 (a), 1 (b) and 1 (c) and which is here referred to and by reference thereto is made part hereof.

Plaintiff says further that prior to and to ascertain the condition and contents of said insured premises and property with specific and particular reference to the advisability of executing and attaching said rider to said policy

that the defendant's duly authorized agent went upon and inspected said insured premises and the contents thereof and was fully apprized and advised as to the condition of said premises and of said contents, materials and supplies and of the nature and of the business which was then being carried on therein and thereon.

And for further answer and reply to said Specifications of Defense No. 2, the said plaintiff joins issue thereon.

And so the plaintiff says that by reason of the matters and things answered, replied and alleged by the said plaintiff to the said various Specifications of Defense filed by the said defendant and each and all of them the said policy sued upon has not been rendered null and void, but that on the contrary the liability of the said defendant has not been affected or lessened but that the said plaintiff has a right to recover in this action.

Sophia C. Bachmann, by Counsel. Carl G. Bachmann and Handlan, Garden & Matthews, Attorneys for Sophia C. Bachmann.

[fol. 19] *Duly sworn to by Carl G. Bachmann. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER EMPANELING JURY AND COMMENCING TRIAL—Entered Nov. 7, 1929

This day came the plaintiff, Sophia C. Bachmann, by Carl G. Bachmann, Esq., G. Alan Garden, Esq., and J. Bernard Handlan, Esq., her Attorneys, and then and there came as well also the defendant, St. Paul Fire and Marine Insurance Co., St. Paul, Minn., a corporation, by Russell L. Furbee and James M. Guiher, its Attorneys, and the said defendant having at rules filed its Specification of Defenses herein Numbered respectively 1, 2 and 3, now with leave of the Court withdrew its said Specification No. 3 and thereupon with leave of the Court, the said plaintiff now in open court files her certain Answer and Reply to the said Speci-

fications of Defense Numbered 1 and 2 filed by the said defendant herein, and the same are made part of the record [fol. 20] herein and for further plea in this behalf, the said defendant pleads "non-assumpsit" and to the said Replies of the said plaintiff the defendant's specifications, the said defendant replies generally.

Thereupon came Louis E. Schrader, a qualified and official stenographer and Court Reporter, who, was then duly sworn as an official reporter of this Court in this acton.

Thereupon came a jury, to-wit: Edward F. Frei, S. L. Long, Charles W. Duers, Dora Smith, B. S. Henderson, Seabury Buzzard, J. E. Bloyd, W. C. Connell, W. H. Anderson, Elmer Jackson, A. D. Peake and J. Brady Davis, twelve good and lawful men, selected, tried and sworn as the law directs to well and truly try the issues joined herein and a true verdict render according to the law and the evidence, who having heard the opening statements of counsel, and having heard the evidence adduced, and the hour of adjournment having arrived the said jury is adjourned until tomorrow morning at nine thirty, to which time the further hearing in this case is continued.

In United States District Court

Order-Trial Continued and Directed Verdict for Plaintiff Refused—Entered Nov. 8, 1929

This day came again the parties hereto as on yesterday, and came also the jury heretofore empaneled and sworn in this case, and they having heard the conclusion of the testimony offered upon behalf of the defendant, were excused until tomorrow morning at nine thirty and retired from the court room.

Thereupon the plaintiff moved the court to exclude the testimony offered by the defendant and to direct the jury to return a verdict in her favor, which motion being argued by counsel, and considered by the court, was over-ruled, to which ruling of the court the plaintiff excepted. And the hour of adjournment having arrived, further hearing in this case is continued until tomorrow morning at nine thirty.

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER-TRIAL CONTINUED—Entered Nov. 9, 1929

This day came the plaintiff and defendant hereto as heretofore, and came also the jury heretofore empaneled and sworn in this case pursuant to their adjournment on yesterday, and they having heard the testimony adduced, and the hour of adjournment having arrived, and adjourned until Monday morning at nine thirty, to which time the further hearing in this case is continued.

IN UNITED STATES DISTRICT COURT

ORDER-TESTIMONY COMPLETED, MOTION FOR DIRECTED VERDICT, AND DEFENDANT'S MOTION WITHDRAWN—Entered Nov. 11, 1929

This day came again the parties hereto as heretofore, and came also the jury heretofore empaneled and sworn in this case pursuant to their adjournment on Saturday, and the jury having heard the conclusion of the testimony, thereupon out of the hearing of the jury the defendant moved the court to exclude the testimony offered upon behalf of the plaintiff and direct the jury to return a verdict in its favor; thereupon, out of the hearing of the jury the plaintiff moved the court to direct the jury to return a verdict in her favor upon all the testimony offered. Thereupon the defendant moved the court to be allowed to withdraw its first motion, which motion to withdraw defendant's motion for a directed verdict was resisted by the plaintiff, and the court having considered said last motion, doth allow the same, to which ruling of the court the plaintiff excepted. Thereupon, the court having considered the motion of the plaintiff to direct a verdict in her favor, doth overrule the same, to which ruling of the court the plaintiff excepted. Thereupon the jury having heard the arguments of counsel and the hour of adjournment having arrived, and adjourned until tomorrow morning at nine thirty, to which time the further hearing in this case is continued.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER-VERDICT OF JURY RENDERED—Entered Nov. 12, 1929

This day came again the parties hereto, as heretofore, and came also the jury heretofore empaneled and sworn in this cause, pursuant to their adjournment on yesterday, and they having heard the instructions of the court, retired to their room to consider of their verdict, and after a time returned into court, and upon their oaths, do say, "We, the jury, find for the Plaintiff and assess her damages at $4,591.84. A. D. Peake, Foreman". And the hour of adjournment having arrived the further hearing in this case is continued until tomorrow morning at nine-thirty.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT ORDER—Entered November 13, 1929

This day came again the parties hereto as heretofore. Thereupon, the defendant moved the court to set aside the verdict of the jury rendered in this case on yesterday, and grant it a new trial, which motion being considered by the court, is overruled, to which ruling of the court the defendant excepted. Thereupon the defendant moved the court in arrest of judgment upon the verdict so rendered against it, which motion having been considered by the court, is overruled, to which ruling of the court the defendant excepted.

It is therefore considered by the court that the plaintiff Sophia C. Bachmann, do recover of and from the defendant, St. Paul Fire and Marine Insurance Company, St. Paul, Minn., a corporation, the sum of Four Thousand Five Hundred and Ninety-One Dollars and Eighty-Four Cents ($4,591.84), with interest thereon from this date until paid, and the costs of the plaintiff herein expended.

And the defendant having intimated through counsel its intention to appeal from the judgment herein rendered against it, it is ordered that the said defendant be and it hereby is given 90 days from this date within which to file and have saved to it its proper bills of exceptions herein, and execution upon the said judgment herein rendered is stayed for a like period, without bond, the plaintiff having

[fol. 23] in open court waived bond for stay of execution. Enter- November 13, 1929.

W. E. Baker, Judge.

Satisfactory.

G. Alan Garden, of Counsel for Plf. Russell L. Furbee, of Counsel for Defendant.

IN UNITED STATES DISTRICT COURT

Defendant's Bill of Exceptions—Filed February 3, 1930

CAPTION

Be it remembered that the above case was tried in the District Court of the United States for the Northern District of West Virginia, at Wheeling, at the October, 1929, term thereof before Honorable William E. Baker, Judge of said District Court, and a jury, commencing on the 7th day of November, 1929.

Mr. J. B. Handlan and Mr. G. Alan Garden of Messr. Handlan, Garden and Matthews, Attorneys at Law, of Wheeling, West Virginia, and Honorable Carl G. Bachmann, of Wheeling, West Virginia, were counsel for the plaintiff.

Mr. James M. Guiher, of Messrs. Steptoe & Johnson, Attorneys at law, of Clarksburg, West Virginia, and Mr. Russell L. Furbee, of Fairmont, West Virginia, were counsel for the defendant.

Mr. Louis E. Schrader, Shorthand Reporter, of Wheeling, West Virginia, was sworn to act as the official reporter in this case.

STIPULATION

Before the taking of testimony was commenced, the following stipulations were made upon the record by counsel for the parties:

1. That the final result of this case shall control the final result in the two companion cases of the above named plaintiff against the Caledonian Insurance Company of Scotland [fol. 24] and against the American Central Insurance Company of St. Louis, Missouri.

2. That the defendant company is a foreign corporation and at the time of the issuing of the policy herein, and of the issuing of the riders thereon, was carrying on a fire insurance business in the State of West Virginia.

3. That the policy of insurance sued upon herein and riders thereto attached were duly accepted and delivered, and the premiums thereon paid, and were in full force and effect at the time of the fire, unless the policy had been forfeited and nullified by the alleged violations as set forth in the defendant's Specifications of Defense Nos. 1 and 2 filed in this case.

4. That the defendant has regularly and properly filed its Specifications of Defense Nos. 1, 2 and 3 in this case, but now withdraws and abandons its Specification of Defense No. 3, relating to alleged false statements in the proof of loss.

Thereupon, the plaintiff, to maintain the issues on her part, introduced the following testimony:

CHARLES F. BACHMANN

Direct examination:

Has lived at Wheeling, West Virginia, for sixty-five years and is the husband of the plaintiff Sophia C. Bachmann, who was the owner of the insured building at the time of the fire. A fire occurred at this property about six o'clock on Sunday evening, December 27, 1925, and the building was practically totally destroyed. My estimate for the loss was over fifteen thousand dollars. I made a contract with Edward Bachmann for replacing or repairing the property, for $15,000.

At this point, the following papers were offered and introduced in evidence, and properly identified as exhibits herein, without objection:

1. Fire insurance policy No. 7040 issued by the defend-
[fol. 25] ant St. Paul Fire & Marine Insurance Company to the plaintiff Sophia C. Bachmann being in the amount of $4,000.00, and issued under date of February 14, 1924, together with the rider attached thereto or Form No. 4 relating to the privileges granted. This policy was duly

identified by the Reporter as "Plaintiff's Exhibit No. 1—C. F. B."

2. The original proof of loss furnished after the fire by the plaintiff to the defendant St. Paul Fire & Marine Insurance Company, which was duly identified by the Reporter as "Plaintiff's Exhibit No. 2—C. F. B."

The said two exhibits aforesaid were in the words and figures following, to-wit:

NOTE BY DISTRICT CLERK.—For "Plaintiff's Exhibit No. 1—C. F. B." See page 2, et seq., of this transcript

PLAINTIFF'S EXHIBIT No. 2—C. F. B. PROOF OF LOSS

Proof of Loss

Policy No.: 7040. Renewal No.: —. Amount of Policy: $4,000.00.

St. Paul Fire & Marine Insurance Company of St. Paul, Minn.

By Your Policy of Insurance No. 7040, issued at your Wheeling, W. Va., Agency, dated the 14th day of February, 1924, and expiring the 14th day of February, 1927, at 12 o'clock noon, you insured Mrs. Sophia C. Bachmann against loss or damage by fire, to the amount of Four Thousand and No/100 Dollars, according to the terms and conditions printed therein; the written portion and all endorsements, transfers and assignments being as follows: $—.

Mrs. Sophia C. Bachmann.

Form No. 4

Mercantile Building under Protection

(Standard Form W. Va. Fire Underwriters' Association)

$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous, including founda-
[fol. 26] tions; partitions, vaults and fittings, fire doors, elevators and their appurtenances; heating, lighting and

ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situate at No. 1312 Main Street, Wheeling, West Va.

#7040—St. Paul Fire & Marine Insurance Company—Mrs. Sophia C. Bachmann.

Policy originally issued for $4,000.00.

In May, 1924, claim was paid amounting to	$174.40
In Sept., 1924 " " " " "	41.11
Policy reduced	$215.51
Amount in force at time of fire December 27, 1925	$3,784.49

Privileges Granted

NOTE BY DISTRICT CLERK.—For Privileges Granted see page 3 of this transcript.

Schedule "B" attached hereto, contains a complete list of all Policies held by her at the time of the fire, covering on property herein described. Full copies of the written portions thereof will be furnished on demand.

The property described in said policy belonged, at the time of the fire hereinafter mentioned, to Mrs. Sophia C. Bachmann, and no other person or persons had any interest therein, except as mentioned below.

If the loss is on building, state whether Real Estate is owned in fee simple or held on lease—In fee simple.

State the nature and amount of incumbrance at time of the fire—None.

The building described, or containing the property described in said policy, was occupied at the time of the fire as follows:

First floor, mercantile purposes by Bill Virsca.
Second floor, " " " " "
Third floor, " " " " "
Fourth floor, mercantile purposes by Bill Virsca.
Fifth floor, ——.

and for no other purpose whatever.

A fire occurred on the 27th day of December, 1925, about the hour of 5:02 o'clock p. m., by which the property described by said policy and situate as therein named was

destroyed or damaged, as hereinafter set forth in detail, said fire originating as follows: Unknown.

[fol. 27] The actual cash value of each specific subject thus situated and described by the aforesaid policy at the time of loss, and the actual loss and damage by said fire to the same, as shown by annexed schedule, and for which claim is hereby made, were as follows:

	Sound value	Total loss	Total insurance	Amount named in this policy	Claimed under this *this* policy
1st item of policy.....	26,350.00	15,139.98	14,515.10	3,784.49	3,784.49
2d item of policy.....	.....	.....	.....	.....	.....
3d item of policy.....	.....	.....	.....	.....	.....
4th item of policy.....	.....	.....	.....	.....	.....
5th item of policy.....	.....	.....	.....	.....	.....
Total	26,350.00	15,139.98	14,515.10	3,784.49	3,784.49

Total Amount claimed of this Company under above named Policy $3,784.49

(For a detailed statement of value and loss, see schedule herewith, which is made a part of this Proof of Loss.)

At the time said insurance was effected, the property described by said policy belonged to Mrs. Sophia C. Bachmann, and the said fire did not originate by any act, design or procurement on the part of the assured, or this affiant, or in consequence of any fraud or evil practice done or suffered by said assured, this affiant; nothing has been done by or with the assured's or this affiant's privity or consent to violate the conditions of the policy, or render it void; no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and in possession of, the said assured at the time of said fire; no property saved has been in any manner concealed, and no attempt to deceive the said Company, as to the extent of said loss, has in any manner been made.

Any other information that may be required will be furnished on call, and considered a portion of these proofs.

It is expressly stipulated that there has been no waiver of any of the rights or defenses of this Company by the furnishing of this "Proof of Loss" blank to the assured, or making up of proofs by an adjuster, or any agent of the Company or Companies named herein, or in any other way whatever.

Brick masonry:	
Repairing South wall Building in around joist ends	375.00
Rebuilding North Party wall down to second floor line	1150.00
Tin roof, 32 squares	640.00
Replacing awning	125.00
Plate Glass	163.38
Extra Glass (Offices)	65.00
Painting, 2 coats	490.00
Metal Ceilings First & Second Floors	725.00
Elevator Pent House & Supports	400.00
Elevator	2575.00

[fol. 30]

Wiring

Basement	55.00
" center lights	
" Pull chain drop	33.00
1 switch	6.50
First Floor	
" " Center Lights	55.00
4 lights in offices	20.00
Sw. for Cut Lights	6.50
11 Pull Chain Drops	33.00
4 chain fixtures	16.00
Entrance Light	19.00
Second Floor Lights	
" " Center lights	55.00
11 Pull Chain Drops	33.00
1 Switch	6.50
Third Floor	
Same as Second Floor	94.50
Light Service	80.00
" Panel	25.00
Wiring Elevator	175.00

Plumbing & Gas

Roughing in material	160.00
3 Enamel Closets, Combinations Complete	105.26
3—18"x21" Lavatories	65.00
18 Gas Fires—6 on each floor	126.50
3 Hose Connections	12.50
Labor	395.00

Schedule "B" of Insurance and Apportionment of Claim

No. of policy	Date of expiration of policy	Name of company	Amount* of policy	Total claim	1st item, $— Amount insures	1st item, $— Amount claimed
7040	Feb. 14, 1927	St. Paul Fire & Marine Insurance Company	3,784.49	3,784.49	.....	.....
4825	Oct. 1, 1926	American Central Insurance Company	4,730.61	4,730.61	.....	.....
3560060	June 12, 1928	Caledonian Ins. Co.	6,000.00	6,000.00	.....	.....
		Totals	14,515.10	14,515.00	.....	.....

*When one item, fill this column only.

[fol. 31] NOTE BY DISTRICT CLERK.—2nd, 3rd, 4th, and 5th Items, corresponding to 1st Item $— above, being blank, are omitted.

Claim No. —. Proof of Loss. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn. Policy No. 7040. Amount of Policy: $4000.00 (3784.49). Assured: Mrs. Sophia C. Backmann. Agency: Wheeling, W. Va. Date of Fire: December 27th, 1925. Proof Received —— —, 19—. Amount Claimed: $3784.49. Amount Allowed: $——. Less Discount: $——. Amount Paid: $——. Rec'd Feb. 19, 1926. St. P. F. & M. Ins. Co., Loss Dept.

Adjuster's Certificate

This is to certify that I have carefully examined the detailed evidence of loss sustained by the insured named herein, and I hereby recommend that the sum of — Dollars be the basis of settlement, and that the Insurance Company named herein pay the insured the sum of — Dollars.

Dated —— —, 19—.

—— ——, Adjuster.

[fol. 32] The policy introduced in evidence covered the property destroyed by the fire in question, and the rider attached thereto was attached prior to the time of the fire, at least six or eight months before. The proof of loss was prepared and executed by the plaintiff and sent into the defendant company, and the defendant company acknowledged receipt thereof. The defendant company has paid nothing whatsoever under its policy by reason of the fire which occurred on December 27, 1925.

Cross-examination:

The policy introduced in evidence covers a building located on the east side of Main Street in the City of Wheeling, known as 1312 Main Street. The building is located in the heart of the business section of the city of Wheeling, Main Street being the second best business street in the city. The building had three stories and a fourth story which was really only a half story. The roof on the building slanted, with the result that the building was substantially a four-story building on Main Street, but the fourth story only extended back therefrom about fifty or sixty feet, making the

rear three story. I have looked after the supervision, handling and leasing of this building for many years upon behalf of my wife, the legal owner, and was so looking after all her various properties, including this building, in December, 1925, and long prior to that time. I was not in the building at the time of the fire, and did not have a key thereto, the fire occurred on December 27, 1925, on Sunday afternoon near 6:00 P. M. The man that I had leased the property to for my wife had the key. The building had been leased to a man named Bill Varisca, who was a foreigner, and I believe an Italian.

Witness then examined the original lease of the insured property to said Bill Varisca, the instrument being dated October 29, 1925. The lease commenced on the first day of November, 1925, and expired on the 30th day of April, 1927. Witness here identified the instrument as the original lease. I signed the lease myself upon behalf of my wife, and it was also signed by Bill Varisca. The instrument was signed at my office in the Riley Law Building, in Wheeling.

[fol. 33] Thereupon, the said lease dated October 29, 1925, was introduced in evidence by the defendant, without objection, and was identified by the Reporter as "Defendant's Exhibit No. 1", said exhibit being in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT 1

"This lease, made and entered into this 29th day of October, 1925, by and between Charles F. Bachmann, of Wheeling, West Virginia (hereinafter designated Lessor) and Bill Verisca, of Martins Ferry, Ohio (herenafter designated Lessee),

"Witnesseth: That the said Lessor has and by these presents doth lease unto the said Lessee, for the sole purpose of conducting a wholesale grocery and produce business, the following described premises situated on the East side of Main Street in the City of Wheeling, for the term of one year and six months, that is to say: The four story brick building and premises designated and known as Number 1312 Main Street, Wheeling, Ohio County, West Virginia. Excepting, however, the office on the third floor and the fourth floor of said building and premises which is hereby reserved by the said Lessor for their own use and

purposes with right to ingress and egress at any time, with use of the elevator.

"To have and to hold the same for the full term of One (1) year and Six (6) months, commencing on and including the first day of November, 1925, and ending on the 30th day of April, 1927, and the said Lessee hereby agrees and binds themselves to pay or to cause to be paid unto said Lessor, his heirs, personal representatives or assigns, the just and full sum of Six Thousand Three Hundred ($6,300.00) Dollars, payable in equal monthly installment of Three Hundred Fifty ($350.00) Dollars, in advance, on the first day of each and every month, beginning on the first day of November, 1925, and monthly thereafter during the term hereby created.

Said Lessee agrees, that he will not transfer or assign this lease, or sub-let the premises aforesaid or any part thereof without the written consent of the said Lessor, his personal representatives, or assigns. And the said Lessee [fol. 34] shall remain liable for the fulfillment of all promises, covenants, conditions or stipulations contained in this lease including the payment of all rents, charges and payment of every kind and character to be made under and by the said Lessee; but it is expressly understood and agreed by and between said Lessor and said Lessee, for themselves, heirs and personal representatives, that neither this lease nor any part of it shall be assignable by reason of failure, insolvency, or proceedings taken by said Lessee for the purpose of liquidation, nor shall this lease be assignable by bankruptcy proceedings instituted by or against the said Lessee.

Said Lessee further agrees to protect the elevator, all water pipes, drains, plumbing and glass on the premises herein leased, and to repair the same at their own expense, and to keep said premises generally in repair and in a clean and healthy condition in accordance with ordinances of the City of Wheeling, and laws of the State of West Virginia, and to surrender said premises at the expiration of this lease or sooner termination thereof by forfeiture, or otherwise in as good condition as when the same were entered upon, unavoidable accidents, natural wear and tear excepted. It is strictly understood and agreed that the Lessee will immediately repair and keep in repair the elevator so that it can be used at all times.

"It is expressly understood by the said Lessor and said Lessee that the said Lessee will not have, nor permit on said premises, intoxicating liquors of any kind or character, and the keeping of same, or the permitting of same on said premises, shall at the option of the said Lessor terminate the tenancy hereby created.

"It is agreed by and between the said Lessor and the said Lessee that if there are any repairs or alterations to be made to the aforesaid premises the same shall be made by and at the expense of the Lessee but before doing so the said Lessee shall give two weeks notice in writing to the said Lessor, his successors or assigns, and shall receive the written consent of the said Lessor, his successors and assigns, to make such alterations and repairs.

"And it is further stipulated and agreed that the said Lessee is to vacate, surrender and give prompt and peace-[fol. 35] able possession of the aforesaid premises unto the said Lessor, his successors or assigns at the expiration of this lease, unless aforesaid premises are again leased unto the said Lessee by written agreement.

"It is further agreed that the said Lessor, his heirs, personal representatives, agent or assigns may enter into and upon the premises at any time said Lessor shall desire, to examine same or to make repairs and for three months next preceding the expiration of said term to place the usual notices of 'For Rent' and 'For Sale' on any outside wall of said premises and remain thereon without hindrance or molestation. If said premises become vacant or deserted during the said term said Lessee does hereby authorize the said Lessor, his heirs, personal representative, agent or assign to recover the same at their option and relet and receive and apply the rent so received to the payment of rent due by these presents.

"If at any time during the continuance of this lease the said Lessee shall fail to comply with any and all of the promises and agreements herein contained, the said Lessor, his heirs, personal representatives and assigns, shall have the right to re-enter and possess the leased premises as aforesaid, the same as though this lease had not been made, but his or their so re-entering and being so possessed shall not bar or preclude him or them from pur-

suing the other remedies known to the laws of West Virginia for the collection of rent and damages.

"No failure of the Lessor to collect promptly when due the rent hereunder for any month or any part of the prompt payment thereof, nor any indulgence by the rent for any month or any part thereof after default in the rent due for any month, nor the acceptance of the Lessor extended to the Lessee respecting the payment of rent for any month or any part thereof after default in the prompt payment thereof, nor any indulgence by the Lessor extended to the Lessee respecting the payment of the rent for any month or any part thereof, shall be construed as a waiver by the Lessor of the prompt payment when due of the rent or any part of it for any other month, or as a waiver by the Lessor of his right to re-enter for non-[fol. 36] payment of rent for any such other month, or as establishing a course of business between the landlord and tenant to be followed thereafter.

"Witness the following signatures and seals:

"Chas. F. Bachmann. (Seal.) Bill Varisca. (Seal.)

(Endorsement:) "Lease. Charles F. Bachmann to Bill Varisca."

Under the aforesaid lease, I reserved the right to the possession and use of an office which was located on the third floor of the insured building, about fifteen feet from the Main Street end on said floor; at this time I could get up to this office either by a stairway or by the elevator.

"Q. That is you had a stairway running up and also an elevator?

A. Yes, sir.

Q. But I believe the elevator, at the time of the fire, December 27, 1925, was not running, was it?

A. Well, I left the building about Thanksgiving Day, or before, a day or so. I went to the power company and had all the power shut off—discontinued.

Q. So that at the time of the fire the electricity was cut off from the building, and also, I believe, the natural gas was turned off, wasn't it?

A. I had that attended to, but I can't say whether they turned it off that day or not. I gave notice to have it turned off.

Q. It was done shortly after that?
A. Yes, sir.
Q. And before the fire?
A. Yes, sir.
Q. So that any one going up to your office on the third floor after what I believe you describe as Thanksgiving Day, 1925, had to walk up the stairs, did they not?
A. Yes, sir."

The third floor of the building was one large room, with the office about fifteen feet "cut off in front". The door to the office was located about the middle of the building. The stairway came up on the side of the building so that [fol. 37] a person walking up the stairs would come out on the third floor and then walk a distance of about ten feet to the office door. At the time the lease was executed I delivered the keys to Bill Varisca, and the building was locked up. The last time I saw Bill Varisca was when I delivered to him the lease and the keys. I got the money on the same day. The lease provides for monthly rental of $350.00, and Varisca paid me three months' rent in advance, that is $1,050.00, all in cash. I have never seen Bill Varisca since, and he never showed up or could be found after the fire.

When Bill Varisca approached me about renting this property, I was not acquainted with him and, so far as I know, none of my acquaintances knew him. I do not think I has ever seen him before. He had no letter of introduction to me. He came originally to my office on the third floor of the insured building at 1312 Main Street. He came there two or three different times. The last time he came to see me, and when he got the lease, was after I had moved out of the insured building and into my office in the Riley Law Building. The elevator shaft in the insured building was located near the Main Street end of the building, approximately fifteen to twenty feet from the front end. The advance payments, aggregating $1,050.00 in cash, made to me by Bill Varisca were to cover the last three months of the lease. I told him that I did not know him and that "you got to identify yourself with me or give me security". I said, "If you bring me some security of somebody to identify you this is all right. If not, you must pay me three months' rent in advance, to

be applied at the end of the lease, provided that you fail to make any payment of the lease in advance, and payment of rent in advance, as per your contract, you forfeit your lease and you forfeit your money". All if this conversation took place in the Riley Law Building.

Redirect examination:

The Varisca lease, dated October 29, 1925, was actually signed and delivered on that day, and the keys were then delivered. I moved out of the insured building on Thanksgiving day, 1925. My son Carl left for Washington on [fol. 38] Thanksgiving morning. I moved out the same day, and by referring to a telegram, I find that it was on November 26, 1925, that I left the building. On that day, I moved my office from the insured building on Main Street to my son Carl's law office in the Riley Law Building. I do not mean that I occupied the Main Street Building from October 29th to November 26th.

When Varisca came to my office in the insured building on Main Street and agreed on the lease, he paid me one month's rent in advance, that is, $350.00. This was done prior to October 29, 1925, some time in September. I agreed on a lease with him at that time, but did not deliver one to him. I told him that I would have to have a lease prepared and would deliver it to him later, which I did. I actually got the $350.00 payment before the lease was executed or delivered, and the payment of $1,050.00 was made at my office in the Riley Law Building when the lease was delivered to Varisca. I told Varisca: "Now, I don't know you. You have got to give me security or identify yourself—give me some recommendation, or in lieu of that you have got to pay me."

I moved into the Riley Law Building on Thanksgiving day, November 26, 1925, and it was there that Varisca paid me $1,050.00, and I turned the keys over to him. I carried the keys until after I had moved out of the Main Street Building on Thanksgiving day. Varisca paid me the rent for the month of November in September, and he got the lease the day it was signed. It was at the Riley Law Building when I turned over the keys to Varisca that I exacted the three months' rent from him.

When I moved out of the insured building on Main Street, I left there a couple of flat top desks, a typewriter, three safes and office fixtures. Several times thereafter I went down to the building in order to get in, looked at the door, and shook the door several times with Dr. Hersey and once with Ed Diehl, to see if we could get some papers that we had left there in the safe. I was unable to get in the building. That was after I had delivered the keys. I left the insured building on Thanksgiving day 1925, and never was in the building thereafter until the time of the fire. Thereupon the following questions were asked the witness by counsel for the plaintiff, and the following answers were made by him:

[fol. 39] "Q. How was it that you continued carrying the key during the month of November, from the first of November, the day of the beginning of his tenancy, up until the 26th day of November, Thangsgiving day, the day you turned the key over?

A. I had to make a lease, and I hadn't made that. I just made the contract with him, and agreement with him, and he bound it by paying $350. Then when I gave him the lease, as I told Mr. Guiher, I didn't know him, I wanted some identification or security to stand good for him.

Q. You mean when you gave him the lease, you wanted this security?

A. Before I gave him the lease.

Q. I thought so. It appears, then, you did not give him the lease, or did not ask for that security until Thanksgiving Day—is that correct?

A. No, sir—after Thanksgiving Day—when I was up in the Riley Law Building, where I delivered the lease and got the money.

A. You delivered the lease to him up in the Riley Law Building?

A. Yes, sir.

Q. How did it come, then, that the lease was dated about a month before that—October 29, 1925?

A. Let me see the lease, and then I will explain it to you. (Referring to lease.) I prepared the lease a little ahead, expecting him to come in, so that I would have it ready for him, like I usually do.

Witness my hand at Wheeling, West Va., this 16th day of February, 1926.

Mrs. Sophia C. Bachmann, Assured.

[fol. 28] STATE OF WEST VIRGINIA,
County of Ohio, ss:

February 16th, 1926.

Personally appeared Mrs. Sophia C. Bachmann, signer of the foregoing statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of.

Subscribed and sworn to before me the day and date above written. J. Wilbert Johnson. (Seal.)

STATE OF WEST VIRGINIA,
County of Ohio, ss:

Earle M. Giesey, residing in Wheeling, W. Va., most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the assured or sufferers; that I have examined the circumstances attending the fire, or damage as alleged, and that I am well acquainted with the character and circumstances of the assured, and do verily believe that the assured has by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of Fourteen Thousand, Five Hundred, Fifteen and 10/100 Dollars.

In testimony whereof I have hereunto set my hand and official seal this 16th day of February, A. D., 1926.

Chas. G. Gally. (Seal.) My commission expires Aug. 4, 1933.

(NOTE.—This certificate should not be acknowledged before an agent of this Company acting as an officer of a Court, Justice of the Peace or Notary Public.)

Schedule "A"—Statement of Loss

Put nothing here except what assured actually agrees to and signs. All other statements and reports should be separate from proofs.

Joists & Floors

First floor 30 pcs. 2″x14″x22′	
Second " 123 " 2″x14″x22′	$960.54
Third " 123 " 2″x14″x24′	
Fourth " 50 " 2″x12″x24′	428.30
Roof Rafters 120 " 2″x12″x24′	
Hauling above from R. R. cars	80.00
Roof sheeting—3400 Ft.	188.50
First Floor Flooring 1″x4″—3400 Ft	298.00
[fol. 29] Second Floor Flooring 1″x4″—3400 Ft.	
Third Floor Flooring 1″x4″—3400 Ft.	812.00
Fourth " " 1″x4″—1400 "	
480 pcs.—1″x6″x12′ for floor trussing	162.40
9 " 2″x12″x16′ stair carriages	
2 " 2″x12″x20′ " "	68.30
156 linear Ft. 2″x10″ Step material treads	
400 Ft. T & G 1″x6″ sheeting around pent house	68.22
22 pcs. 2″x6″x12′ around pent house	
Cornice—65 linear Ft. 1″x12″ white pine	
" —60 " " 1″x6″ " "	31.13
12 Kegs nails	55.50
Second Floor front—3 plank window frames 30″x36″, 2 lts, 8½″ jam-s complete with sash & glazing D. S. A.	62.75
Second Floor rear—3 plank window frames 30″x30″, 2lts, 8½″ Jam-s complete	
Third Floor Front & Rear—6 plank window frames 30″x30″, 2 lts, 8½″ jam-s compl.	161.00
Fourth floor front—3 plank window frames 30″x28″, 2 lts, 8½″ jam-s complete	55.25
32 pcs. 1″x10″x10′, #2 White Pine	
1350 linear Ft. 1″x10″x10′, #2 White Pine	145.92
340 " " 1″x2″ #2 " "	

Partitions

First floor offices—beaded ceiling, 1″x4″, 2″x4″, 2 doors	125.00
Second Floor offices—beaded ceiling, 1″x4″, 2″x4″, 1 door	110.00
Third Floor offices—beaded ceiling, 1″x4″, 2″x4″, 1 door	100.00
Carpenter labor	2942.03

Q. That is, the lease was prepared and dated October 29, and he did not actually come in and get it until Thanksgiving day, is that right?

A. He came after Thanksgiving Day.

Q. You told Mr. Guiher the lease was signed in the Riley Law Building?

A. Yes, sir, after Thanksgiving Day."

Since testimony above (during noon recess) I have examined my bank deposit book and check book to refresh my recollection as to the dates. These books show the exact dates the cash payments were made to me by Bill Varisca. I find that Varisca paid me the $350.00 on October 16, 1925—I was mistaken when I said September. The books show that Varisca paid me $1,400.00 at the Riley Law Building on November 30, 1925; $350.00 being for December, 1925, and three months rent in addition as a guarantee. The sum of $1,400.00 was deposited in the Bank on November 30, 1925, as shown by the bank book, and the lease and [fol. 40] key were actually delivered to Varisca on the same date. The $350.00 paid on October 16, 1925, was rent in advance for the month of November, although no lease had then been drawn up. The $1,400.00 payment on November 30th included December rent of $350.00 and the lump sum of $1,050.00 as security.

It was on October 16, 1925, that I agreed to lease the building to Varisca. He then paid me the rent in advance for November. Then I had to have the lease prepared and it was not ready until October 29, 1925. I did not give the lease to him on that date, because he didn't come in; I did not see him until November 30, 1925, and it was not signed by Varisca and myself until November 30th. It was actually signed at the office of my son Carl in the Riley Law Building. Varisca first came to see me about leasing the building about the middle of September, 1925, and before we actually agreed upon the lease he came two or three times in person and telephoned me at l-ast half a dozen times. I estimate that he called me by telephone five or six times. Varisca made these personal calls and telephoned me because I did not give him the lease at first. I had been talking with the Carey Roofing Company and Mr. McGregor about leasing the building to them. I was asking both the Carey Roofing Company and McGregor $350.00 a month as

rent. McGregor told me he would see me again about a lease. Mr. Harry Meyers was the man in charge of the local office of Carey Roofing Company; he came to me in September, 1925, and asked the rental price, which I told him would be $350.00. He said he would have to submit the proposition to the regular rental agent of the company in Cincinnati. This rental agent actually came from Cincinnati two or three weeks later. In the meantime, I was holding Bill Varisea off until I found out whether I could lease the building to Carey Roofing Company. I held Varisca off approximately thirty days in order to give Carey Roofing Company a chance to get the lease. I was giving the preference to Carey Roofing Company, rather than to Varisca or McGregor, because I knew them; they had an established business, and they wanted a ten-year lease.

When Varisca came to see me about the lease, I asked him who he was and where he was from. He replied that he was [fol. 41] in the wholesale grovery business in Martins Ferry, Ohio. I told him that I did not know him, but he replied that he knew me and used to buy lots of goods from me, referring to the wholesale produce business which I had been engaged in in Wheeling for about forty years. Between November 30, 1925, and the time of the fire, I went down to the insured building and tried to get in a dozen times or more when I was with someone else. Also, I usually went to the brokerage office once or twice a day, and as I went by the building I would look in and shake the door. Sometimes I was by myself and at other times with other people. At no time between November 30, 1925, and the time of the fire, when I went to the building was I able to get in, nor could I see anything by looking in the door.

The Carey Roofing Company had their engineer go down to look at the insured building. I deny that after they looked it over they offered me only $250.00 for it. Carey Roofing Company never declined to take the building, but they did not get it because I had already leased it to Varisca and would not wait any longer for them. The payment which I got from Varisca was the cash payments which he made me, $350.00 on October 16, 1925, and $1,400.00 on November 30, 1925. I was in the insured building last at Thanksgiving time, 1925, on or about November 26, 1925. I am positive that I was never in the building again until

after the fire on December 27, 1925, and I am just as positive about that as I am of the rest of my testimony.

Thereupon the following questions were propounded to the witness and answers returned by him upon cross examination:

"Q. You observed from the lease this morning that you reserved the right, in the lease, to the office on the third floor, and the right of ingress and egress to that office, and to use the elevator in the building to get there? You remember that, don't you?

A. Yes, sir.

Q. Now, Mr. Bachmann, you tell the jury, if you delivered all the keys to Mr. Varisca, how you expected to make use of that reservation in the lease?

A. I did not expect to make use of it at all, other than if I needed a paper or something, when the people was in [fol. 42] there, to go through when they were in there, to get in the safe and get out what I wanted. I took out all the papers I thought I needed, but later Dr. Hersey and I had some deals on, and I couldn't find the papers, and I thought they were there, and we tried a number of times to get in, to get those papers, and was unable to get in.

Q. With all that big building, and with your right to use part of it, and with your papers and furniture in there, that you did have there, you didn't keep a single key?

A. No, sir, I took all my active papers out. Mostly storage stuff was in there."

At this point, the plaintiff rested her case.

Thereupon the defendant, to maintain the issues on its part, introduced testimony and evidence as follows:

GEORGE A. HASTINGS

Direct examination:

I have lived in Wheeling, W. Va., since 1891. Engaged in business as merchandise broker since 1894 in and about Wheeling. Have known Charles F. Bachmann, the plaintiff's husband, ever since I have been in Wheeling. I recall

when the Bachmann building at 1312 Main Street in Wheeling burned. I was then in Michigan on a holiday visit, having left Wheeling on Monday or Tuesday preceding the fire. On the day that I left Wheeling for Michigan I saw Charles F. Bachmann coming out of the front door of the building at 1312 Main Street. It was rather a cold morning, and as I came down Main Street about ten a. m., Bachmann came out of the front door of the building; I met him there and we walked to 14th Street together. As he came out the door he locked it and put the key in his pocket. I met him just as he came out the door and we walked on down Main Street and I wished him a Merry Christmas and parted. The fire occurred on Sunday, and this meeting with Bachmann was on the Monday preceding the fire. If the fire occurred on December 27, 1925, I saw Charles F. Bachmann come out of the building on Main Street on December 21, 1925.

[fol. 43] Cross-examination:

I met Mr. Bachmann coming out of the building a little before or after ten o'clock in the morning. The weather was cold or rather chilly, I don't remember clearly whether there was any snow or ice on the ground, or whether clear, cloudy or rainy. I had gone from my office in the National Exchange Bank Building and was going down to the Neill Grocery Company and other merchandise houses, as I do each morning. I don't recall anyone besides Mr. Bachmann whom I met on that trip. Bachmann locked the front door of the building by turning the key over and then put the key in his pocket. I did not see the key. I had never been in the Bachmann building so as to have occasion to open or close this door. I do not know what sort of a lock was on the door or whether it required the turning of a key to lock it. Mr. Bachmann and I talked generally, as two men would who met on the street and I left him at the corner of 14th Street, wishing him a Merry Christmas. I went on down Main Street and Bachmann went up toward Market Street. I left for Michigan on the Detroit train, either the same evening or the following evening. Since I have been subpœnaed as a witness in this case I have not tried to inform myself as to the exact date by making any examination. I returned from Michigan about two weeks later, around January 9th to 11th, 1926. I have told somebody that I passed

by the Bachmann building on the opposite side of Main Street and saw Mr. Bachmann shaking the door and didn't know whether he was going in or coming out.

On last Saturday morning Mr. Henry Elig talked to me about this matter. Elig asked me what, if anything, I knew about this Bachmann fire insurance case which was coming up for trial. I may have told Elig that it had been so long I did not know or remember anything about it. I said this because I did not consider that Elig had any right to ask me such questions, knowing that I was subpœnaed as a witness. He had my name and some other names. I did not tell Elig that the reason I did not answer his question, except as I did, was because I had been subpœnaed as a wit-
[fol. 44] ness. I do not know what kind of a lock was on the front door of the Bachmann Building.

Re-direct examination:

I did not see the list which Mr. Elig had, but know that he had such list because he mentioned some of the people, Elig wanted to know how I got in with Prince, Furbee and Doerr and the prohibition element generally. Elig was formerly in the grocery business with Neill Grocery Co., and Speidel and we have been old friends. Elig approached me on the street and asked me about the matter. I received my subpœna to testify on behalf of the defendant in this case one day last week. Since the subpœna was served on me, I did not think I should talk of it. When asked how many people approached me about it, he replied:

"I wouldn't know that anybody had made a dead set approach to know what my testimony would be. Anything that did come up, came in a casual conversational way."

W. L. Smith

Direct examination:

I have been engaged in the automobile business in Wheeling for sixteen years; have been acquainted with Charles F. Bachmann, plaintiff's husband, for about forty years. In 1925, I was renting a property from Charles F. Bachman located at 2209 Main Street in Wheeling. About the first

of December, 1925, I was endeavoring to get a reduction in rent on the property from Bachmann and was also discussing a renewal of the lease until the following May. Our negotiations or conversation about this lease took place at Mr. Bachmann's Office on the third floor of the Bachmann building on Main Street in Wheeling in the first part of December, 1925.

Cross-examination:

My conversation with Mr. Bachmann aforesaid took place in the building on Main Street after December 1, 1925, and [fol. 45] not later than December 10, 1925. I am able to fix these dates because some time after the fire I was called before the Federal grand jury here and at the time I took particular pains to go into this matter and I had some records which fixed the date definitely in my mind. I was asked to bring these records before the grand jury in connection with some case and in that way I was able to fix the date as in December, 1925—"not anywhere close to Christmas."

I had rented the property at 2208 Main Street from Bachmann for ten or twelve years prior to 1925. The lease was sometimes one year, sometimes two years, and sometimes two years with an option. Before the expiration of the renting period, I would have a conversation with Mr. Bachmann about renewing the lease and this happened a good many times during the period of ten years and I was in his office on many occasions. Last time I was in Bachmann's office was at the time I have stated above in December, 1925. I do not recall that I was ever in Mr. Bachmann's office in the Riley Law Building and I don't remember of going there in December, 1925, to talk to him about a renewal of my lease. I am positive that I talked to Bachmann in his office in the insured building on Main Street in the first week of December, 1925. When I first went in the office on that occasion there was some one else there and who went out, there was no one in the office except Bachmann and myself and we were discussing the renewal of the lease. I went in the building by the front door, which was open, and then up the stairway to the office. On the first floor of the building I saw a man sitting in a chair at the back of the building. He would usually be there when I went to the building and would tell me to go on

up to the office or go up with me. "He was the fellow who always brought the rent bill around." So far as I could see, the first floor of the building was empty at that time. After going up the stairway to the second floor, I had to walk some distance to get to the steps to go on up to the third floor. I don't remember seeing anything on the second floor at that time, it being rather dark there and very little light, but the stairway could be seen. The stairway was perhaps thirty feet back from the front of the building. I could see across the second floor to the bottom of the steps leading up to the third floor without any trouble. I [fol. 46] was not looking for anything on the second floor and saw nothing that I can remember; if there had been anything there I think I would have seen it. I saw no boxes or barrels or anything of that kind on the second floor.

On one of my visits to Bachmann's office, I saw some men working on the third floor but don't know what they were doing; but am not sure this was on my last visit. I was there a number of times not far apart. The workmen appeared to be putting up a partition on the third floor—at any rate it looked like a partition. This work was being done about twenty feet back of the stairway, or approximately fifty feet back from the front of the building. It seemed to be built about one-half or one-third of the distance across the room and was not yet finished. This partition went up from the floor, but I do not know whether it went all the way to the ceiling.

Bachmann's office was on the third floor, in the front. I would not say that this partition was being built on the third floor at the time of my last visit there. I do not know whether there was a fourth floor. When I went into Bachmann's office, there was some one whom I did not know but he immediately went out. I saw nothing on the third floor except the men working. I remained in the office about twenty-five minutes talking about renewal of the lease and about the purchase of a car and then left. As I came out of the office, I would face toward the rear of the building and had a full view over the whole length of the floor back to the rear, if there was nothing obstructing

Q. You had full view for the whole length of the floor back to the alley, didn't you?

A. Yes, I think I could have if there wasn't anything obstructing.

Q. What was there obstructing? You saw nothing but a partition a third way up. What else? If there was nothing obstructing, you could see clear back to the alley, couldn't you?

A. I don't remember whether I could or not.

Q. Why couldn't you?

A. I don't know.

On leaving the office, I would have to walk fifteen or twenty steps before starting down the stairway. I don't recall seeing anything on the third floor except the men [fol. 47] working there and I am not positive that men were working at the time of my last visit in December, 1925. As I came down the flight of steps to the second floor, I would have had a clear view of the whole of the second floor back to the rear, but I don't know that I looked back, as I had no reason to look. As I went down the stairway from the second floor to the first floor, I had a clear view of the first floor, but don't remember that I saw anything there.

I have nothing by which I can fix the exact date of my visit in December, 1925. I know it was after the 1st of December, 1925, because I checked the date up very carefully before going before the grand jury. Today I looked over the records of the grand jury—it was true at that time. I never knew Charles F. Bachmann was in the Riley Law Building, and do not recall ever having a conversation with him in that building or leaving it. Charles F. Bachman spoke to me last Saturday in one of the brokerage offices; he said something about this case which was coming up for trial but I do not recall exactly the nature of his remarks. I told Mr. Bachmann that I did not know what I was subpœnaed for, as I did not think that I knew anything about the case, and I still don't think I know anything about it. Also, I talked with Mr. Garden, one of the plaintiff's attorneys, and likewise told him that I did not know why I had been subpoenaed, because I knew nothing. I don't think yet I know anything particular about this case. I am absolutely sure that at the time of my said visit to Mr. Bachmann's office in the building on Main Street it was not in November, 1925, but was during the first week in December, 1925.

At the time of my last visit to Mr. Bachmann's office in December, 1925, I am quite certain that I saw in the rear

part of the first floor the man who brought me the rent bills from Mr. Bachmann. I don't think this man went upstairs with me to the office.

MRS. ELLA WEIDNER

Direct examination:

I was working for Zarnits Brothers Grocery Company in Wheeling in 1925. They occupied the building on Main [fol. 48] Street in Wheeling next to the Bachmann building which burned on December, 1925. I worked on the second floor of the Zarnitz Brothers building in December, 1925, and usually went to work about seven-thirty or eight o'clock in the morning. In the fall of 1925, when the windows were open on the second floor of the building, I very often smelled the fumes of liquor. This occurred during the working hours of the day. It would be various times—I could not specify the time. I do not recall whether I smelled the odor of liquor in December, 1925, as the windows were then closed, but before I closed the windows in the fall of 1925 I used to smell the liquor all along.

Cross-examination:

I do not recall when I closed the windows on account of cold weather. We had warm weather along in October and the closing of the windows depended on the weather. If it was cold, I kept the windows closed, and if it was warm I raised them. It was pretty cold in December. I do not know where the fumes of liquor were coming from. I smelled the fumes at different times.

We would joke and say, "If you want a sociable jag come and get a smell". This was some time in the afternoon. This was during the fall of 1925, but I could not say what month or whether early or late in the fall. I feel positive that I did not smell the fumes in December, 1925, because I think the windows were then closed.

Redirect examination:

When the windows were open I would smell the fumes of liquor and when the windows were closed I did not observe the odor.

At this point, counsel for plaintiff moved the court to strike out all of the evidence of the witness Mrs. Ella Weidner and to instruct the jury to disregard it.

The court for the time being withheld its ruling upon the motion.

[fol. 49] ELMER FADDIS

Direct examination:

Age 36. Has been a city firemen at Wheeling for four years and was a member of the Wheeling Fire Department in December, 1925. I was one of the first firemen to get to the Bachmann building on Main Street at the time of the fire. I went into the building by the rear door on the first floor. The door was not locked. I do not believe it was over fifteen minutes from the time we left the fire station until I had a line in the Bachmann building. The fire was upstairs on one of the upper floors. There was no fire on the first floor except what was falling down the elevator shaft. I was not able to get up the stairs. There was very little fire—mostly smoke. In being asked whether there was considerable fire, he said: "No, sir, it was all flames."

Cross-examination:

Ashby Jackson and myself were the first two firemen who reached the fire. Ashby drove the truck and I put the first line into the building. I do not know whether the windows in the back of the building were intact as I did not look at them. The elevator shaft was up towards the front part of the building. There was no fire in the front part of the building except the little bit coming down the elevator shaft. I could not get up the stairway as it was all on fire, so I turned around and came out in the alley. Then I took the hose and went on the roof of the building. The stairway was at the front, across from the elevator shaft.

Redirect examination:

It was an awful cold day. I remember because I was all froze up and could hardly move.

[fol. 50] STIPULATION—WEATHER

At this point, it was stipulated by counsel for the plaintiff upon the record that at the time of the fire, the thermometer was two degrees below zero.

Thereupon, counsel for the plaintiff, moved to exclude all of the testimony of the witness Elmer Faddis and to instruct the jury to disregard the same. The court for the time being withheld its ruling upon this motion.

MRS. AUGUST W. FORSCH

Direct examination:

Has resided in the City of Wheeling for about twenty years and lived there in December, 1925, at the time of the fire in the Bachmann building. I lived at No. 25 14th Street. The rear of the Bachmann building was close to the building in which I resided—I think there were possibly two stores between us. From our house, I could see the back windows of the Bachmann building. I was standing at our back window when the Bachmann building was burning. Prior to the time the fire was discovered, we heard three or four explosions, but I cannot state where they were at. One of these explosions jarred the building in which we were living, the other three were not so heavy. I don't know who turned in fire alarm. My husband first saw the fire. I can't remember just how long these explosions occurred before my son went to turn in the fire alarm.

Cross-examination:

When the explosions occurred, we didn't pay any attention to them at that time. It was then probably between four and five o'clock in the afternoon, though I don't remember exactly. I fix this time because my husband west to the kitchen about five o'clock to look at the dinner which was on the stove and the explosion occurred before he went to the kitchen, and I am positive the explosions were before [fol. 51] five o'clock, but I cannot say how long before. My husband sent my son to turn in the alarm. I did not.

I think there were at least four of the explosions. There was first one explosion, and then an interval and the other three came closer together. I am unable to say what interval elapsed between the first explosion and the last. The interval could not have been so very long; it could have been five minutes or longer. "I could not say any definite time." I don't know where the explosions came from. The explosions sounded muffled at a distance—like it was a great distance—but you couldn't tell much about it. The Bachmann building was almost next to our kitchen.

Redirect examination:

One of the explosions rocked the house in which we were living.

MR. AUGUST W. FORSCH

Direct examination:

I was living in the City of Wheeling in December, 1925. I am the husband of the preceding witness. The rear of the Bachmann building is approximately 80 to 100 feet from the building in which we were living. There are possibly two buildings in between. My wife and I were home on the afternoon of the fire. I think that I was probably the first person to discover the fire. I went to the rear of our building and looked out and saw the smoke. I saw "the windows come out of the rear of Mr. Bachmann's building". I saw the windows of the Bachmann building puff out from the heat, I presume it was. The windows I am speaking of were on the second or third floor of the rear of the Bachmann building, at least above the first floor. I sent my boy out to turn in the alarm.

Prior to the time of my discovery of the fire, I heard something in the nature of an explosion. It was a distant rumbling sound, like the backfire of a motor or an explosion. It seemed to come from a distance. It shook our building somewhat. This was earlier in the day, probably around four o'clock in the afternoon.

[fol. 52] Cross-examination:

It seemed to me that there were about four explosions or rumbles. There was first a rather loud report and then three minor reports. I presume that this was about four o'clock. It was just about five o'clock that I discovered the fire because I looked at our clock. Just about an hour elapsed from the time I heard the explosion until I discovered the fire and smoke.

Thereupon counsel for the plaintiff moved the court to exclude all of the testimony of the foregoing witnesses, Mrs. August W. Forsch and August W. Forsch, and to instruct the jury to disregard the same. The court for the time being reserved its ruling upon this motion.

GEORGE B. HEIDE

Is the person is charge of police of Wheeling Steel Corporation at Benwood. In 1925 was a Federal Prohibition Agent and at that time had been such agent for four or five years, located at Wheeling, West Virginia. Continued to serve as such agent until May 1, 1928. Recalls the fire in the Bachmann Building on Main Street on December 27, 1925, and immediately thereafter made an investigation at said building in my official capacity as Federal Prohibition Agent. On the day following the fire, I made an investigation between four or five o'clock in the afternoon. I then went to the rear of the building with Alonzo Price, then a Deputy Commissioner of Prohibition of the State of West Virginia, and Jesse McGill, a Deputy Sheriff. There was a ladder at the rear of the building by which we ascended to either the second or third floor. I am not sure which. About 25 or 30 feet from the rear of the building, to the front of the building, we found three moonshine stills of approximately 150-gallon capacity each. We got two of the stills out that evening between four and five o'clock, and as it began to get dark, we left the other still there. "We could see there was another still there, but it seem- there was a lot of timber covered with ice. The two stills removed were taken to the County Jail. We also saw about forty or fifty barrels—that looked like the floor fell down [fol. 53] just in the rear—containing mash. On that first

day, we took out the two stills and the lead lines, that is, the two pipes that run from the boiler down into the coil. We did not take any of the tanks out at that time as it got dark and we had to quit. The interior of the building at that time was pretty well covered with ice and timber, and was pretty well wrecked.

We went back to the building again the following morning; I think Mr. Alonzo Price, Mr. Bradley and Mr. Ritz, the Fire Marshal, went with me. About nine o'clock that morning we got into the rear of the Bachmann Building downstairs and there found 25-five gallon cans of gasoline. "There was a building, just sort of, it might have been an office building" a partition, on the other side there was some corn sugar, but I do not recall the amount thereof. We took these cans to be gasoline, as it smelled like it, but I did not open any can. I was called away on another investigation, and was not in the Backmann Building after that.

When I was at the building on Monday afternoon after the fire, I did not find any arrangement or apparatus of any kind for the heating of the moonshine stills, nor did I find any such on Tuesday. On Tuesday morning, we entered the first floor of the building from the rear. We found the gasoline first on the basement floor—the first floor—in the rear on the alley. Then we looked a little further and, as I recall, there was sort of a little office building or partition between where we found the gasoline and where we found the corn sugar. There was a considerable number of bags of corn sugar, but I do not recall the exact amount. This corn sugar was the kind ordinarily used in the manufacture of mash.

Some time before the date of the fire at the Bachmann Building, Mr. Alonzo Prince and I were in the immediate vicinity of said building, and smelled mash. Thereupon counsel for the plaintiff moved to strike out this answer of the witness, which motion was resisted by the defendant. The court sustained the motion to strike out said answer for the time being, and instructed the jury to disregard the question and answer, to which action of the court the defendant duly excepted. The Court further held that the defendant had the right to put this witness on later.

[fol. 54] In the week preceding the date of the fire I had been in the immediate vicinity of the Bachmann Building two or three times. We were in that vicinity for the pur-

pose of making investigations, as we had smelled the odor of mash in that neighborhood during the seven days next preceding the fire. We searched some buildings in the immediate vicinity of the Bachmann Building. We searched a furniture store, the name of which I forget at present.

The witness having been asked why he searched the furniture store, and objection having been made by counsel for the defendant, which objection was sustained by the court, and to which the defendant excepted, the following proceedings were had at the desk of the court, and outside of the hearing of the jury.

(The witness, answering without the presence of the jury, answered as follows):

"A. I searched the furniture store. We thought we smelled the odor of mash in that vicinity. We went down and smelled through some other place, and we searched, and we didn't find anything there.

Mr. Furbee: On how many occasions did you detect a smell or odor of mash——

Mr. Bachmann: We object. You are going into another question now.

Mr. Furbee: Let me finish:—within the seven days next preceding the date of the fire.

Objection. Sustained. Exception by defendant.

Mr. Furbee: I mean in that immediate vicinity.

The Witness: Now, that is just a little hard. That has been quite awhile ago. I know two or three occasions we were there. I will say that. I feel confident we was there on two or three occasions, and I know we smelled mash there, but to draw down to conclusions, I can't just say.

The Court: Can you say how long before the fire these occasions were?

The Witness: Only my statement the first time. That is as near, Judge, as I would like to answer.

[fol. 55] The Court: State it again.

The Witness: A week or two.

Mr. Furbee:

Q. How close is the furniture store that you searched to the property known as 1312 Main Street?

Objection. Overruled. Exception by defendant.

A. This furniture store is either the second or third door below the National Bank of West Virginia.

Mr. Bachmann: The furniture store that he has reference to is over a full block and a half away from 1312 Main Street? Being next to the National Bank of West Virginia it is about 1218 Main Street.

Mr. Furbee: It is approximately a half block.

Mr. Handlan: It is three-quarters.

The Court: How far is the furniture store in question from the Bachmann building that was burned, Mr. Heide?

The Witness: Your Honor, I would say it was a block at least.

Objection sustained. Exception by defendant.

Mr. Furbee: The defendant excepts to each one of the objections.

The Court: You will have just what you put on the record.

Mr. Guiher: If the Court please, we ask that each of the questions and answers taken in the absence of the jury, and out of the hearing of the jury, be read to the jury.

Mr. Bachmann: To which we object.

Objection sustained. Exception by defendant.

The jury here returned to the courtroom.

The gasoline and sugar which I testified about was found on the first floor of the Bachmann Building in the rear.

[fol. 56] Cross-examination:

I got to the Bachmaan Building the next afternoon after the fire about four o'clock. The building was then pretty well wrecked. "All the other floors had fallen down toward the center, except in the rear." We went into the building on a ladder and it seemed to me we went up to the third floor. I do not remember two ladders there. There was a ladder in the alley in the rear of the Bachmann Building which went up right by a window. After getting on the window sill I had to step down on to the floor a distance of approximately three or four feet. The third floor was not intact clear up to the front of the building. The third floor was intact inwards about 25 or 30 feet from the back wall.

"I do not think we went down on the second floor that night. The next day we went only on the first floor. I do not recall whether I was ever on the second floor.

Q. Do you recall there was a part of the second floor hanging,—maybe a little more hanging of the second floor, —a little bit more than the third floor,—do you recall that?

A. I though- from appearances it looked to me like it was a loft—half a floor.

Q. That may be true, but answer this question: Do you remember the second floor part of the flooring was hanging like you describe hanging on the third floor?

A. It seems to me that at that time—that was the only time that I was on there—it was just where I found the hole. We went in a window, as you said before,—I thought the third floor. The way I looked at it, it looked to me as if the building had shifted,—dropped down and piled up.

Q. Dropped down toward the center?

A. It seems to be like one end of it fell down.

Q. Do you remember the condition of the second floor?

A. It has been so long I can't just remember."

From what I saw in the rear of the first floor, where we found the corn sugar, the first floor was in pretty good shape. "I believe part of the first floor had fallen in the basement—some distance from the door."

We found the remains of the stills about 30 feet from [fol. 57] the rear wall of the third floor, about the edge of the place where the rest of the floor had fallen in the center. It was a little closer to the south wall than it was to the north wall.

"Q. Was that a complete still——"

"A. We could see when we went in there, there was part of a still and ice over some of it."

It was turned up, as if the embers had fallen down and knocked it over. I just judged that the still contained about 150 gallons, but I do not like to say that it held exactly that.

By "boiler", I mean a big copper still about five feet high. It seemed to me like one of the stills was mashed a

little, but I am not sure about the first one which we found. We didn't find anything in the first still. The other still which we removed was close together with the first one and seemed about the same size. It was also a copper boiler, and I think one of the two was mashed a little bit. The lead line with it was about three or four feet long and was about an inch pipe. I can not say whether the pipe was connected with the boiler. We removed the two boilers at that time on Monday, and saw what we thought was another still covered with ice, but did not take it out at that time. As I remember, this still was a little closer to the wall, but I do not know the size of that boiler, because it was all covered with ice. I think I saw the third still afterwards at the jail. We did not attempt to remove this third boiler, because it was getting dark and we had to get out, and I never assisted in getting it out later.

I can not say whether any still was in operation in the Bachmann Building at the time of the fire, but I know it was there when we got there. I did not find gasoline on Monday when the stills were found. I did not have the liquid analyzed which I thought was gasoline, but I smelled it and it smelled to me as though it was gasoline. I do not want to swear absolutely that there was gasoline in the 25-five-gallon cans which I saw on the first floor in the rear. There were 25 cans of five gallons each; they were square cans, about the kind we usually see as liquor cans. They were tin cans, and I don't think they had any wood around them.

[fol. 58] As you went in the rear down on the first floor of the Bachmann Building, there was a little platform; you stepped down from this, and the cans were setting along the rear wall—setting lengthwise along the alley on the inside of this wall. If you would look in a window, you couldn't have seen them. This is all I saw regarding what I believed to be gasoline. It was on Tuesday, the second day after the fire, that I saw the tin cans on the first floor. We made the search for the stills on Monday. The fire was on Sunday.

Redirect examination:

The only things I helped to take away from the Bachmann Building were the two boilers or stills.

Examination by Judge Baker:

The copper boilers were about 25 or 30 feet from the east side of the building. The cans were probably 20 or 25 feet below where the floor had dropped in towards the alley. I can not say just where the copper boilers had been set before the fire, as they may have been knocked around by falling timber. As I remember, one of the boilers was in pretty bad condition; it seemed to me that a timber or something had fallen on it. We did not take out any coils from the stills the first night, as I remember. I did not remove any the next morning. I cannot say that we found the boilers connected with the worm. We took the two boilers and threw them down from the floor to the ground; when we threw them down I didn't see any mash or water come out of them. I don't remember seeing any mash or anything of that character in the boilers when we first found them. I *I* didn't examine the inside of the boilers as to whether there were any remains of mash sticking around; it was pretty cold and we didn't waste much time. As we threw the boilers down, I did not see anything run out.

I did not find any burners or other method of heating the copper boilers at that time, nor did I at that time find any gasoline or gasoline cans at or about the location of the boilers. I don't think I looked at the boilers later at the jail until I went with some college professor, a chemist, in order that he could look at the boilers. I did not see [fol. 59] anything in the two boilers which we took out to indicate to me that they had contained mash at the time of the fire.

J. J. Doerr

Direct examination:

Is a Federal Prohibition Agent, and has occupied that position for about ten years, including 1925. Recalls the fire at the Bachmann Building on Main Street on December 27, 1925. I arrived at Wheeling the night following the fire, Monday, December 28, 1925. Went to scene of fire on Tuesday morning about ten o'clock, accompanied by Alonzo Prince, George B. Heide and two others. We found the

building entirely burned out excepting the rear end. The first part of the second and third floors was still hanging on. On the third floor, I found a still, about 100 gallon capacity, and three burners; three gasoline compressing tanks and about sixty barrels. I examined the contents of these barrels and part of them were full of mash—grain and sugar mash. The still which I found was a complete one, that is, it had a boiler and a connection from the boiler to a coil, condensing coil. Then there was a gasoline burner and a gasoline tank, with an air pump attached, so as to compress or force the gasoline from the gasoline tank to the burner under the still. Two of the gasoline tanks which I f-und were complete and intact; the other had the top blown out. I examined carefully the gasoline tank with the top blown out; the top of it was completely blown off—torn off. The tanks were about thirty inches high and about ten inches in diameter. The complete still which I helped and assisted in removing from the ruins consisted of about 100 gallon capacity boiler—brown copper boiler. The top of it sloped up to a neck, with a cap at the top. From the top of the still there was a copper connection leading a distance of about four feet from the top of the still to the condensing coil. The condensi-g coil was placed in a galvanized tank of about twenty gallons capacity. The still was upon a hot-plate, operated by a gasoline compressing tank, or rather fed from a gasoline compressor tank. The method of operation of such a gasoline compressing [fol. 60] tank is about as follows: The gasoline is placed in the gasoline compressing tank. The tank is then filled with air from a pump, an air-pump something like an automobile pump, which is attached to the tank. There is a gauge on the gasoline tank, and also a valve and a connection with a small lead pipe leading from the gasoline pipe to the burner under the still, and in that way the compressing tank will feed the fuel to the burner in an even manner. The gasoline goes to the burner under the pressure made possible by the air pump into the gasoline tank.

The top or head was blown off of one of the gasoline compressor tanks. I examined the other two compressor tanks and they contained gasoline. They were not full of gasoline. We found a five-gallon can on the third floor of the Bachmann Building, within about ten feet from where the still set. I examined the contents of this can and

it contained gasoline, the can being about two-thirds full. I also made an examination of the first floor of the Bachmann Building, and in the rear of said floor we found about 25 five-gallon cans of gasoline; also five or six sacks of corn sugar and four or five sacks of grain-rye.

I made an examination of the stills which were found in the Bachmann Building. The boiler of the still contained about ten gallons of rye and sugar mash. I also examined the barrels found on the third floor of the Bachmann Building, and they contained about sixty barrels of rye and sugar mash. Not all of the barrels were full; probably twenty-five were full. The mash was ready for distillation. I examined the other two stills, and on one of them the upper rim of the still was blown out, bulged as though it had blown out, the copper being torn.

From my experience as a Federal Prohibition agent, covering a period of ten years, it takes about seven days ordinarily for mash to come to the point that it may be distilled and liquor made from it. That is, I mean that from the time the mash, the sugar, grain, yeast and water are put in the barrel and kept at a warm temperature, it will be ready for distillation in seven days.

Cross-examination:

There were approximately sixty barrels of mash in the Bachmann Building and about twenty-five barrels were [fol. 61] full. There were about thirty-five empty barrels, in which there were some charcoal and debris that had fallen from the roof. Apparently they were used barrels; several of them were partly burned, apparently from the fire—that is, the tops of them were burned. These barrels were located to the rear of the third floor, and toward the east wall, possibly ten feet from the wall. The third floor was partly burned away and the barrels were right at the edge of where the floor still remained. A good many of the barrels had fallen down to the second floor and then to the first floor. The barrels which had fallen down were empty but I can not state how many. The filled barrels were the ones closest to the wall. Some of the barrels were along the south wall, close to said wall; the others were more in the center of the floor, rather bunched together. As I recall, there was a space between the barrels—two rows. The

stills were very close to the edge of the burned floor, that is, near the edge of where the floor had been burned off, and were more toward the middle of the floor than the barrels.

The three stills were sitting in a row. The third one was about in the middle of the floor and the two others extended south toward the south wall. I believe that the stills were located approximately twenty feet from the east or rear wall of the building. The barrels were set in rows, two barrels together; there was space between and then another row of barrels. The stills were about three feet apart. I tested the mash and ascertained exactly what it was. I stirred the mash up and poured some out from several of the barrels. Later, probably the following week, we emptied all of the barrels.

The week after the fire, the temperature was warmer than at the time of the fire. There was ice in and upon the Bachmann Building for a long time. That is the reason we did not get the stills out sooner, because it was covered with ice, and we had to wait for it to thaw. I was not present when the first two stills were removed, but I was present when the third one was taken out. The third still was taken out sometime the following week.

I did not examine any of the adjoining buildings. The adjoining building to the south was badly damaged. A wholesale business had been carried on in said building. I did not make any examination of this adjoining building or either of the adjoining buildings; I only examined the [fol. 62] Bachmann Building. I went into the basement of the Bachmann Building in the elevator shaft and examined that. I do not know of any corn, sugar, grain or anything of that kind being gotten out of the adjoining buildings. An examination was made of the adjoining building, but I did not do it.

I believe that I was in the adjoining building on the south probably a week or ten days after the fire, and there was some sugar, corn and rye found there.

Q. Mr. Doerr, are you familiar with the containers that are used by the oil company, and particularly by the Freedom Oil Company, that they deliver and keep their grease and lubricant in,—copper containers about that high, in circular form? Have you ever seen any of those?

A. I don't recall.

So far as my investigation of the Bachmann Building was concerned, I did not go any further than finding the stills and the gasoline. Whatever else was done was done by somebody else.

I recall there was a part of the floor of the building which was not entirely destroyed and resembled an office room. I recall seeing some safes there, but don't know how many. There were also desks and a chair. I don't recall that they were damaged much. What was left of the second floor of the building was just merely hanging there—apparently just sticking in the wall and sagging down—I know it was dangerous. This condition obtained almost from the front to the rear of the second floor and the third floor was about the same way, though it seemed to stand up a little better than the second floor. There was not much difference between the third and second floors. The roof was entirely burned off.

Most of the empty barrels which I saw were pretty badly burned both inside and out. However, I recall that some of the empty barrels were still up on the third floor and had the appearance of being used for mash.

GEORGE J. KOSSUTH

Direct examination:

Is a photographer at Wheeling, West Virginia. Is handed two photographs and identifies them as having [fol. 63] been taken by the witness in the jail yard at the County Jail of Ohio County at Wheeling. A gentleman took me down and pointed out the things which they wanted photographed and these were the photographs which I took at that time. The photographs were taken on May 11, 1927.

Thereupon, the two photographs examined by this witness were identified by the Reporter as Defendant's Exhibits Nos. 2 and 3, respectively.

Cross-examination:

There were at least two men with me when the photographs were taken. I am not sure whether or not one was a state policeman.

Direct examination:

Age forty-eight, and resides at Follansbee, W. Va. Is Deputy Commissioner of Prohibition for the State of West Virginia and has held such position for about eight years. Before becoming Deputy Commissioner he was a Federal Prohibition agent working out of Washington, D. C. Recalls the fire at the Bachmann building in Wheeling, and following said fire, made an investigation as Deputy Commissioner of Prohibition. My first visit to the Bachmann Building was on Monday, the day following the fire, when I went there with Federal prohibition agent Heide and two newspaper reporters. There were some firemen still guarding the Bachmann building when we got there, and we went up the fire ladder standing at the rear of the building to the third floor. We found three stills on the third floor.

It was a very cold day, and had been very cold for three or four days preceding the fire and for two or three days thereafter. When we got there on Monday there was a lot of ice about the building; the front of the building was a solid glare of ice from roof to sidewalk. The three moonshine stills which we found on the third floor of the Bachmann building were approximately eight feet apart, and were located about twenty five to thirty feet from the [fol. 64] rear wall of the building. The ladder brought us up to a window at the rear of the third floor, about the middle of the building. About twenty feet from the rear wall, straight in front, was the first still. Another still was located about eight feet away, against the south wall of the building, and the third still was located about thirty feet from the rear wall, the third still being seven or eight feet toward the front from the first still that we came to.

On Monday after we had located the stills, we tried to get them out and found that they were connected up with the cooling tub and coil. I went down the ladder to one of the fire wagons and borrowed a wrench and then went up and unscrewed what we call the goose neck or lead pipe, from the coil over to the still, and disconnected the still from the cooling tank. It was absolutely impossible to move the cooling tank, as it was frozen in. The first still we got to contained some mash, and we drained that

through the pet-cock on the bottom. The mash in the still was not frozen, and it drained out through the drain cock at the bottom.

No. 2 still was the furthest one over. It had the top blown off of it—almost off. This still contained frozen water—ice. After we got it back where we could work, I took a piece of lead pipe and pounded the ice out of the still. We got the two stills, throwed them out the window, called the patrol wagon and hauled them to the county jail. These two stills were connected up with the apparatus at the time we went there. We took the two stills down to the jail—that is, just the two copper boilers which constitute the still proper. We had to empty them to get them out of the window. One of the boilers had no mash in it, but did have frozen water. The boiler which had the top partly blown off was the one which contained the ice.

After this first visit, I think we went back to the Bachmann Building about every day for ten or twelve days. I went back the following day with Mr. Heide and Mr. Bradley and Mr. Doerr. This time we visited the rear of the first floor of the building, and there found 25 five gallon cans of gasoline. I examined these cans and opened some of them. They were regular square cans, "not quite square", being what we term as square alcohol cans. On [fol. 65] the other side of the partition from where the gasoline was found, there was some corn sugar and some empty corn sugar sacks. There had not been much fire on the first floor.

I participated in the removal of other apparatus found on the third floor. After the thaw came we got a firemen's ladder and went up to the third story and got out the burners, the air compressers and the other, third, still, and took the third still and coils and the air compressors to the county jail. The burners were destroyed right there on the floor. I examined the third still and found that it contained mash. It was drained and then taken to the county jail.

By word "compressor" used above, I mean the tank that they pump the air into the gasoline over to the burner. There is gasoline in this tank, and then they put air in and force the gasoline over under the burner. There were three of these compressors, one for each still. The three

compressors were connected with the burners, which furnished the heat for the still. The gasoline compressors were connected to the burners, by a little copper hollow wire or two, the purpose of which is to permit the flow of gasoline from the compressor to the burner.

The gasoline compressor that was found near the south wall was in perfect condition, that is, the gauge and the valves were all intact. The compressor used with the first still which was found when I went into the room, had the tops broked off of it. The compressor for the third still, the one furthest to the front of the building, had the top blown entirely out of it. There was gasoline in two of the compressors, being the one next to the south wall, and the one found on entering the building. The gasoline compressors had a capacity of between twenty and twenty-five gallons. There were between eight and ten gallons of gasoline in the compressor next to the south wall, and the other one had between three and four gallons. The compressor which had the end off of it contained nothing except frozen water. I helped to take these three compressors to the Ohio County jail. The three compressors were kept at the jail until along in the latter part of December, 1928. Sheriff Henderson then instructed me to clean everything up, as it was near the end of his term, and I got rid of the stills and the compressors. Photographs of the three com- [fol. 66] pressors were taken at the jail in my presence. I exhibited them to some professor who came from the University at Morgantown.

Thereupon the two photographs hereinbefore identified as Defendant's Exhibits Nos. 2 and 3, were shown to the witness, and he stated that he was present when the photographer Kossuth took the pictures. The witness further stated that at that time Kossuth took photographs of the three air compressors which were taken from the Bachmann Building. The witness further stated that he was requested to go to the jail to get the compressors out of the vault, and that he did so, and further stated that the three compressors were in the same condition at the time the photographs were taken by Mr. Kossuth as they were when removed from the Bachmann Building, except that they had become a little rusty by the time the photographs were taken.

Thereupon, the two photographs hereinbefore marked for identification as Defendant's Exhibits Nos. 2 and 3 were offered in evidence by the defendant, to which the plaintiff objected. The Court overruled the objection, to which ruling the plaintiff excepted as to both of said photographs, and they were thereupon introduced in evidence as hereinbefore identified, and the same are now incorporated in this record and shown below:

NOTE BY DISTRICT CLERK.—The originals of Defendant's Exhibits Nos 2 and 3 accompany this transcript of record by reason of District Court order (page 164 of this transcript.)

In my years of experience in the Prohibition Department, I have had reason to examine and inspect a considerable quantity of moonshine stills, though not so frequently lately. In my eight or nine years with the Prohibition Department I have inspected hundreds of stills. The three stills found in the Bachmann Building were all of the same size and of the same design, and each had a capacity of about 150 gallons. The stills were approximately five feet tall up to the point where the top goes up into a sort of a cone. Then there is a sort of little condenser on the top [fol. 67] where the feeds line goes out. The stills are, I would say, about two feet and a half or three feet thick, and about five feet high, and then there is a five foot lead pipe which leads off from the top of the still over to the cooling tub which contains the coil. The stills sit upon a hot plate which has burners under it, and then there is a feed line which runs from the air compressor to the hot plate. The gasoline is gotten from the storage or compressor tank to the hot plate burner under the stills through the tube which leads from the air compressor to the burner. The air pressure put in the compressor tank forces the gasoline over through sort of a little hose. It is a little hollow copper wire, or small like wire, and the air forces the gasoline through this little pipe over to the burner. Then all you have to do is to light the burner which is the same as if you had natural gas. The air is what forces the gasoline over and makes the heat. The air is pumped into the gasoline tank with a foot pump or hand pump "just *as* the same as you pump up an automobile tire". Apparatus of this

character was found in the Bachmann Building, and the air pump was found connected with the air compressor, and we found it over near the south wall.

Thereupon, the witness was asked from his years of experience in the Prohibition Department and from his investigation of moonshine stills what was the usual type of heat used in operating such stills, to which question the plaintiff objected, and the Court sustained said objection and refused to permit the witness to answer the question in the hearing of the jury, to which action and ruling of the Court the defendant duly excepted. Thereupon, out of the hearing of the jury, the witness answered the question as follows: "Around this part of the country, it is generally gasoline" The jury then returned.

In addition to the mash found in the copper stills on the third floor of the Bachmann Building, I observed mash in barrels there. There were about sixty barrels of fifty gallons capacity each. In addition to the gasoline found in the two compressors on the third floor, I found one five gallon can of gasoline over near the still next to the south wall. I brought this can of gasoline to the Federal Building and kept it in the vault on the fourth floor for quite a long time, then finally I took it and put in in my car and [fol. 68] used it. This was a square alcohol can and was the same type of can as the twenty-five cans which we found on the first floor.

Mash was found in two of the three copper stills. From my experience in the Prohibition Department, the length of time required from the time a mash preparation is begun until it is ready to be run into a still is about five days. The process is warm water first is placed in a boiler then fifty pounds of corn sugar, if you are going to make corn sugar mash, and is allowed to soak, and then yeast, and two or three handfuls of rye grain are used, and in some instances a little bit of carbide is used to hurry the fermentation in case it is to be gotten out in five or six days. Ordinarily, the preparation of mash takes between six and seven days. (Counsel for plaintiff objected to the questions and answers involved in the foregoing paragraph regarding

the preparation of mash, which objection the Court overruled, and to the Court's ruling the plaintiff excepted.)

Prior to the fire in the Bachmann Building I had not observed or found any evidence of moonshine stills operating in that immediate vicinity. (Plaintiff's objection to question evoking this answer was overruled.) I had observed certain unusual odors pertaining to moonshine mash in that vicinity. I had observed the odor of mash coming very strongly from the sewer at the intersection of junction of 13th Street and Main Street about the first part of December, 1925. The Bachmann Building is located at 1312 Main Street, and this was on Alley 13, at the corner of 13th Street. I presume that all of the buildings run into that sewer. I checked on this odor by moving from one place to another in the vicinity and always traced the odor back to this one place. I went to the corner of 14th Street, and did not get any odor there, and then I came up to the corner of 12th Street, and likewise did not get the odor. I presume the entire section there drains into that sewer. I judge it was approximately 250 feet from the place where I detected the odor in the sewer to the back of the Bachmann Building. (Plaintiff objected to all of the testimony of this witness narrated in this paragraph and the court sustained said objection, and struck out said testimony, [fol. 69] and each part thereof, to which ruling of the court the defendant duly excepted.)

Cross-examination:

I have sat in the courtroom during the trial of this case and heard the other witnesses give their testimony. I was requested to remain in the court room by counsel for the defendant. I have received no remuneration from the defendant insurance company, and do not expect to. At the request of Mr. Burbee, who at that time was attorney for the defendant insurance company and also assistant United States Attorney, I helped take photographs of the gasoline condensers.

It is still the custom of Prohibition officers, after making a raid, to make out a written statement of what we find on the premises searched, in the way of stills, and intoxicating liquors. After our search of the Bachmann Building I made such a report to the Prohibition Department at

Charleston, West Virginia. I do not have the statement here because it was sent to Charleston. I have in my pocket my own notes showing what was found at the Bachmann Building at the time of the search—it is in a regular daily diary which I keep.

Thereupon, the witness produced the said diary and at the request of counsel for plaintiff read to the jury the following entry therefrom, under date of December 28, 1925: "Heide and McGill raided 1312 Main Street. Found three 150 gallon stills; 50 pounds of mash."

I have other records from which I have refreshed my recollection with respect to the testimony given in this case. I don't know where the record is now, as it has been some time since I read it over. These matters have been in my memory ever since, because there was a case involving these facts pending until just a short time ago. I have also looked at the records or reports of Mr. Heide regarding our search in the Bachmann Building, not for the purpose of refreshing my recollection, but in order to see what he had in his report. This had nothing to do with my testimony here today.

A few days ago I talked with Mr. Carl G. Bachmann, one of the counsel for the plaintiff, at the United States [fol. 70] Marshall's office in Wheeling. He asked me about a five gallon can of gasoline which I had found and taken out of the Bachmann Building. Also, I talked to Mr. Carl G. Bachmann about this same five gallon can of gasoline yesterday and the day before. The first time I talked with Mr. Bachmann I did not tell him that I did not know what had become of the gasoline. I told him that I had taken it upstairs in the Federal Building, but did not say I did not know what had become of it.

Whereupon, the witness testified also as follows upon cross examination by Honorable Carl G. Bachmann, one of counsel for plaintiffs.

"Q. Didn't you tell me on yesterday when we talked about that same five-gallon can of gasoline, that you had since refreshed your recollection from your notes, and you found that you took it and used it in your automobile,—didn't you tell me that yesterday?

A. Absolutely, I did not. Carl, I told you right there—you was asking me about that gasoline, and I said, "Carl, I will have to tell you. The five-gallon can of gasoline"—you was going to spring something on us about these twenty-five five-gallon cans. That is what you told me. You said, "I will show you".

Mr. Bachmann: Answer my question.

The Witness: Wait until I get through. You said, "I will spring something on you". I said, "Carl, if I were you, I would not mention anything about the gasoline. The fact is the five gallon can, I used it in my automobile, and I know that it is gasoline". Then you changed your tune.

Q. What do you mean changed my tune,—explain yourself.

A. You didn't say that you was going to spring that surprise.

Q. I didn't bring it up until you brought it up.

A. Of course, you didn't not now.

The Court: Never mind the controversy between yourself and Mr. Prince.

Mr. Bachmann: Then I understand you swear here now that you never told me in there you had taken the five-[fol. 71] gallon can of gasoline and you didn't know what became of it, and the second time, that you looked up your notes and found you used it in your automobile?

Objection.

A. No, sir.

Objection overruled."

I did not see any stills operated in the Bachmann Building after Thanksgiving Day, 1925, nor do I know, of my own personal knowledge, that any stills were operated there between Thanksgiving time and the day of the fire. I do not know whether there was any gasoline in the building any time after Thanksgiving up until the night of the fire. The stills were there the day following the fire, but of course I would not know whether there were any in the building on Thanksgiving Day, 1925, or up until the night of the fire. We had a warrant for the search of the Bachmann Building and went down there on Monday afternoon

following the fire, around two or three o'clock. We had with us the warrant which we had obtained from Squire Kindelberger. As soon as we got there we went to the third story, which is the only floor we worked on that afternoon, because after we had worked trying to get the stills out on the third floor it started to get dark on us. We were not on the first or second floor that afternoon. There were timbers over on top of the stills and one of the stills had frozen ice in it so that I had to pound it out. I had to come back down the ladder and get a wrench and go up and take the connections apart. Part of the roof that had not burned, was laying down on top of the stills, and a great deal of ice. We didn't have any axe, but we took an iron pipe that we found there, and dug out around the apparatus. The roof which had fallen down was not on all three of the stills, because one of them was out toward the edge where the whole floor was gutted out, and there was not much roof or timbers on that still. This particular still was laying over on its side against some of the timbers, that is, the boiler part. The floor and timbers were under it, the burner being off to one side. The compressor was attached to the burners, but we did not find it on that day. This was the boiler which had the top blown out of it, that [fol. 72] is, it looked like it was blown out. The top was blown out though I don't know how it was blown out, nor do I know whether it was in that condition before we got there. This boiler was hanging almost over the edge of the floor, and we found a burner and condenser right by it. The condenser was attached to the burner, and a coil was attached to the boiler. The goose nesk was attached on to the coil that was buried in the tub containing the coil. I looked inside of this boiler and found that it contained ice and frozen water and nothing more. We took the boiler and the goose neck to the jail but not the burners. We did not take anything else connected with that still to the jail that afternoon, because it was frozen in.

The other still, in back of the one described above, had falling timbers and ice about it. We took it out that day. The roof was not on top of it but just some timbers that had fallen down. I looked at this boiler and it did not contain water, but mash. I drained the mash out. It was almost zero weather at that time. There was ice frozen around those stills from the water used by the firemen.

This still or boiler was about two-thirds full of mash. Mash may freeze if it is cold enough, but in all my experience I have never seen mash freeze. Mash contains water, grain, and yeast, and after the alcohol starts to form it keeps the mash from freezing. There must have been alcohol in this mash, because it didn't freeze. I poured the mash out. There was nothing connected with this boiler except the lead pipe going to the coil. Also, there was a burner underneath this boiler. The roof timbers had fallen on this boiler and it was sitting there on top of the burner. This boiler was not mashed very much and was in good shape. We did not have to cut the timbers out, but just lifted them away from the boiler. These timbers were about two by six.

The third still was back next to the south wall. The boiler contained mash, being approximately half full. The mash was not frozen when we got it out. We did not pour this mash out that day, because we did not get back to the boiler. It was sitting near the south wall, but was covered entirely by ice. There was no roof over this still. "The roof had burned out over the whole building." We could just see that the still was there and that was all. I did not know whether there was mash in this still on the first day we were there, but we got the mash out of it pos- [fol. 73] sibly a week or ten days later. The other two stills or boilers were taken out the first afternoon together with the goose neck and lead pipe. We didn't take the coils because they were frozen in the ice in the cooling tub and we could not get them out. The coils are inch copper pipe curled around in a galvanized iron tub containing about twenty or twenty-five gallons. We could not take out the coils because they were frozen in the ice in the tub and all of it was frozen to the floor. We took out the boilers and lead pipe the first afternoon and took them to the jail, and also took out a sample of the mash and brought it up to the Federal Building. The sample of mash was gotten from one of the barrels. The mash barrels were on the fourth floor in rear. "The mash barrels were not on the floor with the stills, but on the floor above."

"Q. Mr. Prince, don't you know there wasn't any fourth floor in the rear of that building?

A. No, sir, I don't know it.

Q. Don't you know that there were three floors in that building, and there was only a half floor on the fourth floor from the front end?

A. Well, the fourth floor was there. That is where the barrels were at, on the fourth floor.

Q. What was left of the fourth floor and third floor had all fallen in, hadn't they?

A. The biggest part of it.

Q. You went in from a ladder on the third floor, didn't you?

A. Yes, sir.

Q. And that was the top floor of that building from the rear?

A. That was part of the top floor, yes, sir.

Q. There wasn't any other floor in the rear of the building?

A. Where the barrels was was part of the fourth floor.

Q. In the rear?

A. Yes, sir.

Q. Is that where you found the mash,—on the fourth floor in the rear?

A. Yes, sir.

Q. And up over the top of where the stills were?

A. Yes, sir."

There was no roof over that back part. I think some of the mash barrels had fallen down in the basement. I saw these mash barrels on Monday. I could see them right in front of my eyes, although I was underneath. The [fol. 74] fourth floor did not extend back entirely to the alley in the rear. They were right over my head, above where the stills were; that portion of the fourth floor was still standing. I was down at the Bachmann Building the next day and made a further search. It was then that we found the gasoline cans and corn sugar. I did not see them the first day, because I was not on the first floor at all. The gasoline cans were on the first floor in the rear just as you went in the door from the alley. As we went down a step from the door the cans were along a partition sitting on the floor against the partition. There were twenty-five five gallon square cans. I examined the contents of about three of the cans and took it for granted that they were all the same. With respect to the three

cans, I took the tops off and put my finger in and tasted the contents. It tasted like gasoline to me. And I took it to be gasoline. I also found another five gallon can of gasoline upstairs on the third floor and after I had taken it up to the Federal Building, I examined it in the same way. I also took it to be gasoline. It was kept at the building probably six or eight months before I took it for my own use. I am sure that the can of gasoline which I put in my automobile eight months later was the same can which I took from the Bachmann Building.

In reply to the inquiry as to who gave him this can of gasoline, the witness replied that he took it himself.

At this point, the Court instructed the jury to disregard the conclusion of the witness Prince as stated in his prior testimony, to the effect that the top of the compressor was "blown" off, as it was a mere conclusion.

My duties required me to be out of the city frequently during intervals of days and weeks when I do not go to the city jail. Two of the stills were taken to the jail on Monday, December 28, 1925. I did not see them again until I took down the third still in a week or ten days later. I would go see the stills in the evidence room whenever I went down there, which would sometimes be five or six times a week, and then sometimes I would miss a week or two. Most of the stills that I have taken in raids are stored in the jail yard, but these three particular stills [fol. 75] were stored in the evidence room, that is, in the dungeon room down in the cellar. The deputy sheriff carried the key to this room. I frequently went to this room because I would be taking samples of whiskey and mash down there for storage. I marked these particular stills by tags which were hung on the handles of the stills, but there was nothing marked on the condensors to show that these were the condensers. The condensers, of which the photographs in question had been taken, are the same ones which I put in the jail the day I put the stills in there. I put them in the room and took them out. The compressors which have been photographed look to me exactly the same as the ones I put in there, and I don't see how they could get out and someone substitute something else. "It could have been done, but I didn't hardly think I was working with men of that type". In addition to the three

boilers and compressers we took the three coils and goose necks to the jail. I am sure that the apparatus photographed was the same that was taken out of the Bachmann Building.

The burners were not taken to the jail because they were too heavy and too big and awkward to get out. I did not take them or the gasoline pump or any of the other apparatus to the jail, because I didn't think it was necessary. The compressors were made of galvanized sheet iron and the boilers of copper. (When witness speaks of "condenser," he meant "compressor".)

Redirect examination:

When I went down to the Bachmann Building on the day following the fire, several firemen were still there, and when — went down again on Tuesday, there were still firemen about. With regard to the twenty-five 5 gallon cans of gasoline found on the first floor of the building, I tried to unscrew the tops off of some of the cans, but did not have strength enough to do it. I then kept fooling around until I found three cans that I was able to get the tops off with my fingers without a wrench.

Thereupon, the witness was handed the photograph identified as defendant's Exhibit No. 3, and was asked to describe the purpose of the apparatus appearing on the top thereof. The witness stated that one of the projections is the air gauge to tell the amount of air in the tank. An-
[fol. 76] other is where the gasoline goes through the little lead pipe to the boiler. Another is where the air hose is fastened on to allow air to be pumped into the tank. Another is a little screw valve that is screwed off in order to fill the tank with gasoline.

The witness then produced sketch which he had prepared himself in order to better illustrate the position where he observed the sixty barrels of mash. Counsel for plaintiff objected to the use of said sketch by the witness in his testimony, but the Court overruled the objection, and the plaintiff duly excepted. The witness stated that he prepared the drawing himself, and that it represented the Bachmann Building in his recollection.

The sketch was thereupon identified by the reporter as Defendant's Exhibit No. 4.

The witness stated that he had marked on this sketch the relative location of the barrels of mash and the three moonshine stills. He stated that the location of the three stills was marked with the word "stills" and that he had made little circles on the sketch to represent barrels. The witness stated further that the fourth floor or half story of the building did not extend back to the rear of the Bachmann Building any further than the place where the still- were located.

Thereupon, the witness stepped before the jury, and by pointing to his sketch indicated the relative positions of the stills and the barrels of mash, in the following words:

"This is just a rough sketch that I made up in my office this noon. This is Main Street going down here. This is the front part of the Bachmann building. This is the alley. This is the rear part of the Bachmann building. This is the doorway that came in onto the first floor, down three steps on the first floor of the Bachmann building. This is the second floor of the Bachmann building. This is the third floor of the Bachmann building. This is the fourth floor. Now, this was all gutted out, clean up here, and the roof entirely gone. This floor did not extend clean back to the alley, but it extended to right over where these stills [fol. 77] were located and found on the third floor. This floor had been all burned away, clean through to the roof, but the joists coming through the walls had held a portion of this floor up that had not been burned out on either side of the building. This floor here had been burned out from this point clear to the front where the office part had been. The office was intact. There had been no fire in the office, because the doors were still swinging on hinges to the office, but the balance of the building had all been gutted clear over to this point where the third still was found, which I classed as No. 2 still. No. 3 was against the south wall. This is No. 1. The barrels of mash was on this portion of the floor, and a portion of the fourth wall was still hanging there from the fact that the timbers coming out of the wall held this part of the fourth floor up."

"On the still or boiler where the top is fastened on to the main bowl of the still," it "is riveted around the top and then soldered". A portion of this top, approximately a foot and a half in lenght, had apparently been torn. It was all jagged and rough, "showing that heat had not cause- it."

Objection to latter part of answer and witness was instructed not to draw conclusions.

It was all jagged where the tear was on the still. Part of the lid or top of the still was still hanging on it. And in regard to the condenser where the top was soldered and riveted, the entire top was gone, and the top of the condenser or air compresser was all jagged in one or two places where there were prejectiles, probably a half inch or three-quarters of an inch above where the rim was. You could see where the rivets had been. The holes where some of the rivets had been were torn out.

By referring to the photographs identified as Defendant's Exhibits Nos. 2 and 3, the witness stated that the top of the compressor shown therein represented the condition that he has been trying to detail.

Recross-examination:

The mash barrels were found on what I have always termed the fourth floor of the building, although it does not extend entirely back to the rear. What I mean is that this fourth floor comes back from the front of the building [fol. 78] about two-thirds of the length of the building. There was no floor on this fourth floor from the rear wall of the building.

The witness then marked an "x" upon the sketch, showing how much of the third floor remained after the fire.

The part of the third floor remaining was directly under the part of the fourth floor as I have indicated on the sketch. At the front end of the building, there remained just about the area of the office. That office is about eight or ten feet wide and about 10 feet long. Just a small part of the second floor remained at the rear, and I have marked an "x" on my sketch showing that point. I judged that about ten or fifteen feet of the second floor remained from the rear and I have marked an "x" on this sketch showing the remaining part in the rear. "This part up here toward the front was all burned". Speaking of the remaining portion of the first floor in rear, witness says, "on one side you could walk along up to the elevator shaft, on the lower side of the building". Second floor all destroyed from point marked on diagram over to front wall. The center part of

the first floor was all gutted out. The part remaining of the first floor was close to the front door and along the side by the elevator shaft. On the north side where the st-ir-way was it was all burned out, and down into the basement part of the center part of the first floor was burned out. The following questions and answers ensued:

"Q. So part of the center of this first floor had been burned out?

A. Yes.

Q. There was some little on the north side, and the north wall and south wall, and a little bit in the back?

A. In the rear, yes.

Q. The second floor from that point over to the front?

A. Yes.

Q. Indicate to the jury where you stook on the third floor when you saw the mash barrels.

A. Right here on this floor, between the window and the first still, and looked up and saw the mash barrels.

Q. Was not this floor burned?

A. All the balance of it was, but the part that was hanging by the joists.

[fol. 79] Q. This part of the floor from approximately twenty or thirty-five feet, from the front wall, had it been destroyed, and wasn't the rafters and timbers that held up the floor bent down like that, where they had been hanging after they were burned?

A. This part was all gutted out entirely."

The mash barrels were on the part of the floor that was still hanging from the joists that go through the wall. There were about fifty barrels, I do not know how many, but not all of them were filled. I did not go up to examine them, because one of the other boys brought down a bottle of the mash he got. I saw the boy go up and bring the mash down in a jar. He filled it out of one of the barrels, I did not go up on the fourth floor myself and therefore, cannot say how much mash was up there.

"Q. Didn't you tell this jury there were some sixty barrels of mash in that place?

A. Sixty barrels, I said.

Q. You didn't see any mash in there at all?

A. No, sir, not on the fourth floor, I didn't, because I never got up there.

Q. Were there any mash barrels any place else with mash in them that you saw?
A. No, sir."

All the mash from the barrels that I saw on Monday was what was contained in the jar brought back by the boy out of one of the barrels. This was on Monday.

SAMUEL MORRIS

Direct examination:

Resides at Morgantown, West Virginia. Has been a professor of Chemistry in West Virginia University since 1916.

It was stipulated that Professor Morris had had a complete technical education in Chemistry.

I have been called eight or ten times to testify at trials of moonshine liquor cases. I have had twenty-two or twenty-three years of laboratory experience in the teaching of chemistry and during that time have had occasion to handle and conduct tests with gasoline and other products of petroleum oil. I have made a study and investigation [fol. 80] of the use and handling of gasoline, and have studied the best and authoritative works upon that subject, including the work of the United States Bureau of Mines under the Department of the Interior. As an every day proposition in the chemical laboratory, I have conducted distillation experiments in connection with alcohol and other liquids.

Pure alcohol will freeze at about 170 degrees below zero, Fahrenheit. The freezing point of water is 32 degrees. The freezing point of gasoline is between 130 to 140 below zero. Gasoline is a product of petroleum oil and petroleum oil is made up of a large number of compounds—hydrogen and carbon that have different boiling points, and the petroleum oil is heated and these volatile constituents come off as gasses, then later light liquids, and as the temperature rises, the heavier liquids come off. In good alcohol the gases and lighter liquids are used for something else. Then they catch the same heavier oils. Of course, they are still light, and use them for gasoline. Then later, after the

gasoline is distilled off, come the kerosene oils, and then still heavier oils, lubricating oils, and paraffin. The chemical constituents of gasoline are carbon and hydrogen, about 80% carbon and 20% hydrogen. If gasoline vapors are mixed with a sufficient amount of air, the mixture becomes explosive. The percentage of the two vary somewhat. Burwell in his Bureau of Mines work, says in speaking of hazards in the use of gasoline, that between 1¼% gasoline up to 6% of gasoline vapor, the rest being air, will make an explosive mixture. Below that, and above that percentage of gasoline vapor it is not explosive. In causing an explosion of gasoline, the temperature of the mixture has to be raised sufficiently and a temperature of about 780 degrees Fahrenheit will explode gasoline vapor. That is what would be called a cherry red heat. It requires generally a flame or electric spark to start and ignite the vapor. Gill of Boston Tech in his little book on gasoline says it is on record that gasoline vapors have been known to have been ignited as far away as sixty feet from the point of explosion, and even in filling automobiles, a man standing in front has been known to ignite the fumes that come underneath the automobile or around it to the front of the car.
[fol. 81] Alonzo Prince and Mr. Heide, two of the witnesses in this case, took me to the county jail at Wheeling to examine certain tanks or apparatus, about August 20, 1927. There were three tanks there in the basement.

The witness was then handed the two photographs heretofore introduced in evidence identified as Defendant's Exhibits Nos. 2 and 3 and it was stipulated upon the record that the three tanks pointed out to the witness at the county jail were similar to the ones appearing in the photographs.

Thereupon, the following proceedings were had:

"The Witness: There were three tanks there, and one, in particular, had the top off of it, and all the connections were gone—the connections with the top of the tank. The other two—one of them was apparently in working condition, and the other one was not in working condition,—had some of the connections off of it.

Mr. Handlan: We ask that the part of the answer that there were some apparently in working condition, be stricken out. It is a conclusion of the witness.

Mr. Guiher: I will ask you, Professor, what you mean.

The Court: I will have to sustain the objection to the Professor saying that the tank is in working condition. He can describe what he found, but not draw a conclusion from that finding.

Exception by defendant.

Mr. Guiher:

Q. Professor, I will ask you to describe a little more in detail the appearance of the top of the one tank which you say had no cap or top left on it.

A. There were two stop-cocks on the top of the tank; then there was an opening with a screw cap on it. Knowing those tanks,—having seen them—I could see that the tank was out of the connection that those tanks usually have.

Mr. Guiher: I believe you perhaps misunderstood my question. In referring to the particular tank which I did, I would like you to explain now, Professor, the appearance [fol. 82] of the top of the tank which had the top or cap off of it entirely.

The Witness: That tank, like the others, had had a top. That tank, like the others, had been rivited around the top.

Mr. Handan: This is objected to. We move to exclude the answer.

The Court: He can say there were remains of parts of the rivits, but he cannot draw a conclusion that *he* had been rivitid.

Mr. Guiher: Just explain as near as you can, without concluding or drawing any conclusion.

The Witness: There were rivit holders around the top of the tank, and in one place a part of the cap underneath had been left with the other part—the main part of the tank, and at one place a little part of the cap stood straight up on the tank.

Q. Do you recollect whether the rivit was gone?

A. I don't remember whether the rivit was gone. It must have been held by the indentation of the rivit, at least, because part of it stood up."

I have with me here a compressor tank which is almost identical, with the exception of the size, with the tanks which

I examined at the county jail. The principle of construction involved is the same, but it is smaller in capacity.

Counsel for plaintiff objected to the witness bringing and demonstrating this tank before the jury, which objection the Court sustained.

Thereupon, the witness, at the suggestion of the court went before the jury and explained the working of the compressor tanks as follows, using the photograph exhibit for this purpose.

"These tanks have a stop-cock right here. This tank has an opening right here, to introduce gasoline. Inside that tank is a tube that runs well down to the bottom. Next, there is an opening here to compress air. If you unscrew that cap, you will find that it just goes through there. So that when air is forced through it will go to the top of the [fol. 83] gasoline, and you force with an ordinary automobile pump from the bottom of this tank. There is a small hollow wire, or it is a small feed pipe, to the end of which you can see right here. That wire goes right down and is connected up with this stop cock here. As you compress the air on the gasoline, probably half full, that gasoline flows up from the bottom—starts in at the bottom of this small tube through this stop cock, out through that small tube, to the gasoline burner, where it is burned. Here is an air gauge to show the pressure, so that you can tell what pressure you put upon that, by your automobile pump or bicycle pump.

The Court: How is the pressure put upon that gasoline?

The Witness: Generally by hand—a hand air pump. That is what the company usually furnishes, like a bicycle pump or automobile pump.

Mr. Guiher:

Q. Is this type of tank which you have described in this photograph, and pointed out to the jury, designed to be used with any particular kind of liquid?

A. Yes, with gasoline."

Thereupon the witness testified as follows:

"Q. Professor Morris, just explain the steps in a distillation process of alcohol or alcoholic products with re-

spect to such precautions as you have found are necessary to take in order to carry on the process with safety.

The Witness: Distillation of alcoholic products is for the purpose of separating the alcohol from the water,—at least partially so. Now, in the case of distillation, the alcoholic products, say, are in a container. That container is heated, and the alcohol is volatilized, and passes off. Tho collect this alcohol, there is an outlet with a tube on it which goes through some cooling device, generally running water, and there the fumes of the alcohol are condensed. As to the precaution-: One must always take them and must be very careful that the pressure in this apparatus does not get too high. If it does, the pressure can be relieved sufficiently through the outlet, or if the outlet becomes clogged, then, of course, like an ordinary steam boiler, it will explode, or it is very liable to. This may come about by too high tem- [fol. 84] perature. If you get too high temperature on your still, it will explode. If you get the outlet clogged, and continue your heat, it will explode."

Cross-examination:

I am a professor of Chemistry, but not of mechanics or mechanical engineering. I cannot say, on oath, as a matter of fact, that there was ever a top on the other compressor that compared with the tops on the other two.

"Q. I believe you gave the freezing points of alcohol. You also gave the heating points at which gasoline would explode or burn. You also explained that in order to cause an explosive mixture and combustion that it would require alcoholic vapor and air mixed together in certain proportions. Professor, if you were told that a building, about sixty or eighty feet in depth, and twenty-five or thirty feet in width containing wooden joists and wooden floors, and a wooden roof, took fire about five or six o'clock in the afternoon of a very cold day, and burned all that night and burned until the next morning,—if you were told that condition existed, and that in that building, upon the third or fourth floor, with the fire above and below, that there was a five-gallon can of gasoline there and there were these compressors half full of gasoline, what would you say should

have happened to that gasoline, and that five-gallon — of gasoline, based on your experience and knowledge of chemistry, and particularly of the explosive disposition or tendency of gasoline?

Mr. Guiher: I would be very glad to have Mr. Handlan ask this question, but he is making the witness his own witness. If the Court will recall, I did not inquire about these stills or how they exploded. I merely asked about the mixture.

The Witness: It would be ridiculous for me to attempt to say what would happen to a can of gasoline, unless I knew something of the temperature and how near it was to the fire. It would be ridiculous.

Mr. Handlan: I could not tell you — the temperature [fol. 85] would be of that building. I am asking what in your opinion would be the probably result of that gasoline.

A. I don't know the conditions sufficiently. If the fire burned underneath the gasoline can, I might be able to give you some idea about it then.

Q. Let me add this to the hypothetical question,—some of which is not yet in evidence: Assume, too, Professor, that the floors were burned out,—the second and third floors, either entirely or partially burned out; that the building had been used for the manufacture of candy and of oil products and grease products, for a number or years; there was this oily substance all over the floor, and the building began to burn about five or six o'clock one evening, and continued to burn until the next day.

Mr. Guiher: The question is objected to as not proper cross-examination.

The Court: Mr. Handlan, you may make the witness your own witness.

Mr. Handlan: I will ask him to remain at the conclusion of the present examination."

Gasoline and air will not explode under less than about 780 degrees Fahrenheit. This is what is known as a red or cherry red heat. In order to heat raw materials, such as limestone, manganese, etc., in a furnace, a temperature of around 2,500 degrees Fahrenheit is required. 780 degrees is not an extremely high temperature. If all the

wood in a building and the floors were burned, a temperature of 780 degrees could be reached. If the wood is not scorched, then I am pretty sure that the temperature was not cherry red heat, as the latter will burn wood.

If gasoline is contained in one of these compressors, the compressor itself would be air-tight if there were no holes in it and the stop cocks were closed. If the compressor functions properly it indicates that it is air-tight. If the stills were operating with the compressors as component parts it would indicate that the ones in use were functioning normally. One of the compressors shown in the photographs seemed to have all of its parts except the wire—that is, the wire leading from the top of the gasoline tank over to the burner. This wire has nothing to do with the compressor itself, because it was controlled and would [fol. 86] function, or not function, by the operation of the shut-off at the top of the tank. With the exception of this lead pipe I saw nothing wrong with this one compressor. It seems to be fully equipped, with the possible exception of the gauge. If this compressor had exploded, the top or something would certainly have blown off. With respect to the one compressor on the left which has the top on but with the caps and gauge apparently gone, it does not appear as though there was any explosion in it.

Gasoline has no definite boiling point because it is not made of definite substances. The boiling point runs a little below 100 as I remember. The boiling point of water is 212. It requires nearly twice as much temperature to boil water as to boil gasoline.

At this point counsel for defendant renewed its motion to have read to the jury the several questions propounded by counsel for defendant to its witness George Heide, as heretofore shown, and the answers made thereto, taken in the absence of the jury. The Court reserved its ruling upon this motion.

ALONZO PRINCE

Cross-examination:

I have prepared a diagram of the Bachmann Building, showing what part of the floors remained, and what part were destroyed by the fire.

The diagram or sketch was then produced, and it was identified as Plaintiff's Exhibit No. 7.

This diagram represents the conditions which existed in the Bachmann Building as near as I can tell, immediately after the fire.

Thereupon, the said diagram was introduced in evidence and identified as Plaintiff's Exhibit No. 7, it being as hereinbelow shown.

[fol. 87] NOTE BY DISTRICT CLERK.—The original of Plaintiff's Exhibit No. 7 accompanies this transcript of record by reason of District Court order (page 164 of this transcript).

Thereupon, the witness stepped before the jury and explained the said diagram identified as Plaintiff's Exhibit No. 7.

At the top are two lines marked "fourth floor" which represent all that remained of that floor, yet this floor did not extend all the way through the building. The part to the side marked "alley" was the end of this floor, and the part at the right marked "Main Street" is the part of the floor that was burned out, leaving that portion in the middle still standing. I would say that approximately twenty or twenty-five feet of the fourth floor was still standing.

That part of the third floor which remained is the portion shown on this diagram that protrudes out from the wall of the building marked "alley". About twenty to twenty-five feet of this floor remained, and all the rest had been burned out with the exception of the wall. The only other part of the third floor remaining was a little portion adjoining the Main Street wall of the building, probably about eight feet.

The only portion of the second floor remaining was a small portion attached to the back wall where it is marked "alley", probably about thirty or thirty-five feet. The balance of the second floor clear up to the front of the building on Main Street had been destroyed.

Practically all of the first floor remained with the exception of a small space near the north side of the building. The roof was entirely destroyed.

It was on the fourth floor where twenty or twenty-five feet remained, where I saw the barrels. On this third floor here is where I saw the three stills, and the five gallon can of gasoline. The can of gasoline was close to the wall. The portion of the floor on the south side of the building had not been burned quite as close to the wall as it did right in the middle. This can of gasoline was about ten feet from where the floor had fallen down.

[fol. 88] CHARLES F. BACHMANN (Recalled)

Cross-examination:

Is the same witness who testified before in this case.

Thereupon, the following questions and answers upon cross examination were had outside of the hearing of the jury:

Q. Mr. Bachmann, following the fire in the Bachmann Building on December 27, 1925, is it not a fact that you were indicted by a Federal Grand Jury of the Federal Court at Wheeling, West Virginia by the United States Government, charged with conspiracy to violate the National Prohibition Act, in connection with the operation of the stills found in the building by the prohibition officers?

A. Not shortly. It was several months afterwards.

Q. That is, you were indicted sometime after the fire?

A. Yes, sir.

Q. How long was that indictment pending here before the Federal Court, Mr. Bachmann?

A. About three years.

Q. It is my understanding that eventually the indictment was dismissed—nolled by the United States Government—is that correct?

A. Yes, sir.

Q. Mr. Bachmann, the prohibition officers never caught Bill Varisca, so far as you know, did they?

A. I don't know.

Q. You didn't see him again?

A. No, sir.

Thereupon, the said testimony of the witness having been taken out of the hearing of the jury, on account of

the objections thereto by counsel for plaintiff, the defendant moved that each of the foregoing questions and answers be read to the jury, to which the plaintiff objected, and the Court sustained the objections to each and every question and answer, and to which action and ruling of the Court, the defendant duly excepted.

In sustaining the plaintiff's objections to said testimony [fol. 89] the Court made the following statement upon the record:

"The Court: The Court takes judicial notice of what transpired at the various terms and recalls distinctly that from the time the indictment for conspiracy was found by the Grand Jury against Charles Bachmann and others, the defendants, at practically every term, if not every term, was in open court insisting upon a trial of the defendant, Charles Bachmann, the Government, through its District Attorney, on each occasion announcing it was not ready for trial, and insisting upon a continuance. It was called to the attention of the Court that this failure to grant the defendant a trial was contrary to all precedent, and was very seriously injuring Carl G. Bachmann, son of Charles Bachmann in his candidacy for Congress. Thereupon the Court announced that he would grant the Government one more continuance, and if the case was not tried at the next term, it would be dismissed by the Court for want of prosecution, on my own motion. At the succeeding term of court, with this understanding, the District Attorney came in and asked, on their own motion, to nolle the indictment. Which was accordingly done."

At this point the defendant again renewed its motion to have read to the jury the testimony of the witness George Heide heretofore taken out of the hearing of the jury, in regard to certain investigations made by him in the vicinity of the Bachmann Building before the fire. Plaintiff again objected and the Court sustained said objections and refused to permit the testimony of the witness to be read to the jury, to which ruling of the Court as to each question and answer the defendant duly excepted.

Thereupon, the plaintiff renewed its motion to exclude the testimony of the defendant's witnesses Mrs. Ellen

Weidner, Elmer Faddis, Mrs. August Forsch, and A. W. Forsch. The Court overruled the motion to strike out testimony and each part thereof, of said four witnesses, and to said ruling the plaintiff duly excepted.

At this point, the defendant rested its case.

[fol. 90] Thereupon, on motion of counsel for plaintiff, the Court instructed the jury as follows: relating to certain testimony of the defendant's witness J. J. Doerr regarding the fact that the top of one of the gasoline compressors had been "blown off":

"The Court: Gentlemen of the Jury: Any statement that Mr. Doerr or any other witness made, as a conclusion, that he drew from the facts and circumstances is stricken out. Any statement they made as to conditions as they found them, as they saw, as they existed, remains in."

The defendant duly excepted to this ruling and statement of the Court.

J. J. Doerr (Recalled)

Cross-examination:

All of the stills taken from the Bachmann Building were taken to the county jail. My recollection is that all the various appliances, the cooling tubs, coils, goose neck, and the long pipe that connected the coil up with the still, were taken to the jail. I was with Alonzo Prince when the last still and the boilers and cooling tubs were taken out. These were all imbedded in the ice and had to be cut out. At the time the three stills and the boilers were gotten out the ice had melted to some extent. I think we chopped our way through the ice with an old axe and got them out. The elevator was out of commission and the stairway destroyed. The stills and compressors were brought down by way of a ladder from the rear end of the building. I am not sure whether any of them were pushed out of the windows and dropped into the alley below; probably so. All of this apparatus was on the third floor.

I actually examined probably three or four of the mash barrels myself. They were on the third floor. I actually

examined about three of the gasoline cans. I did not see them all; they were all in the same room and I took the caps off of three of them. They had small caps of the screw type, about two inches in diameter. The cans were square tin cans of five gallon capacity about sixteen inches [fol. 91] high. I am not sure what arrangements there were on the cans for lifting or carrying them. In addition to the gasoline found on the third floor which was in the compressors, I saw the one can of gasoline which was found on the third floor and I examined it.

Thereupon, the plaintiff moved the Court to strike out and exclude all of the defendant's testimony and to direct the jury to return a verdict in favor of the plaintiff, which motion the defendant resisted.

After hearing the arguments of counsel, and taking time to consider, the Court overruled said motion and to said action and ruling of the Court the plaintiff duly excepted.

Thereupon the plaintiff to further maintain the issues on her part, introduced the following testimony in evidence in rebuttal:

A. S. WHITELY

Direct examination:

Is Secretary of the West Virginia Fire Underwriters Association, and has been for approximately twenty years. The insurance companies doing business in West Virginia have prepared and have in use for the instruction of their agents what is known as a Handbook of Rules, Forms and Deposits required by the West Virginia Fire Underwriters Association and the West Virginia Inspection Bureau. The witness was then handed a book which he stated was a book of requirements prescribed by the West Virginia Fire Underwriters Association for the guidance of the companies and agents in the writing of fire insurance and tornado business in West Virginia. The defendant St. Paul Fire & Marine Insurance Company as working under these rules and regulations in 1925. This book is required to be recorded in the office of the Commissioner of Insurance of West Virginia.

The witness then was handed the rider attached to the policy of the defendant company heretofore introduced in [fol. 92] evidence herein, and read a provision thereof as follows: "And for present and other occupations not more hazardous, and to do such work and to keep and use such materials as are usual in such occupancies."

Thereupon, the following proceedings were had during the examination of this witness:

"Q. Turn to rule 73 and read what that books says with respect to the particular sentence that you have just read in this rider.

Objected to.

Mr. Guiher: I do not know what this book is. I think the Court sees it is utterly irrelevant, when it is all in. I want to move to exclude at that time. I think it might be better to have the Court permit this witness to be examined, and then to have the motion to exclude all of it.

The Court: That is agreeable to the Court.

(The book referred to was handed to counsel for defendant.)

Mr. Guiher: This is subject to our objection. We are going to move to exclude it.

Mr. Bachmann: Will you read Rule No. 1 to the jury?

The Witness (reading:)

"Form No. 1. Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

"Note.—It is understood that the word "materials" as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

Mr. Bachmann: State whether or not the rider on the [fol. 93] policy which you now have before you is the rider that was in use by the three insurance companies that I mentioned, at and during the time in 1925?

A. That was the clause in use, and which was prescribed by us. I would not say it was in use by the insurance companies, but it was prescribed by us.

Q. The clause in the rider is the same clause that Rule 73 refers to?

A. Yes. This particular clause was in use at that time.

Mr. Bachmann: I now offer the rule itself in evidence, and ask that it may be copied, so that the original book may be returned to Mr. Whitely.

Mr. Guiher: If the Court please, we now move to exclude all testimony of this witness, including the tender of the book which has been offered."

The defendant also then moved the court to instruct the jury to disregard the foregoing quoted evidence of this witness and the parts of said books which were read to the jury as aforesaid. For the meantime the court reserved its ruling upon the objections of the defendant to all of the foregoing evidence of the witness. Later the court overruled the objection to said evidence and the defendant excepted thereto, as hereinafter shown.

DAVID TYLER.

Direct examination:

Resides at Wheeling, West Virginia, and is connected with the Tyler Iron Works, engaged in the structural iron and ornamental iron business. Has had about twenty years' experience as a draftsman in designing and drawing buildings. Since 1923, and 1924, has been in and about the Bachmann Building on Main Street approximately once or twice a week. Has prepared a sketch of the Bachmann Building, as near as I can remember it, showing the condition, at the time of the fire and immediately prior thereto, [fol. 94] of the various floors, the contour of the building, both front and rear.

Thereupon the witness produced two sketches which were identified by the Reporter as plaintiff's exhibits 8 and 9—Tyler.

These two sketches were prepared by me and show its condition just before the fire in December, 1925; they show the floor plans, elevation and cross-section of the Sophia Bachmann Building. Thereupon the sketches were passed

around among the jury These sketches were marked to show the first, second and third floors.

There was really no fourth floor of the building; we called it instead a loft, and I show it on these drawings. One could get up to the loft either by a ladder or by the elevator. If the elevator were out of commission, then it would be necessary in getting from the third to the fourth floor of the building, to go up the wood ladder. This ladder was straight and ran from the third floor to the loft floor along one side of the building; it was approximately twenty inches wide and about eleven or twelve feet high. So far as I know, there were no water connections on this fourth floor or loft. If there were sixty barrels upon this fourth floor, they could have been gotten up there by the ladder or the elevator. This fourth floor or loft extended from the front of the building on Main Street back to the rear approximately forty feet. The elevator was operated by electric power. I was in the Bachmann Building the day following the fire. At that time, the center portion of the building from the roof down was all down on the first floor. The front of the building, practically all the way up to the roof was up so a person could climb up to it, and a portion of the back of the building was in the same way so that you could climb up to it by means of a ladder. The portion of the floors on the west side of the building, the second and third floors, and part of the loft and part of the roof remained; that is, approximately twenty to twenty-five feet running from west to east. At the back of the building, I would say that there remained a portion of the second floor [fol. 95] and a little of the third—I would say from 10 to 20 feet. There was no fourth floor on the east side of the building.

The day following the fire I reached the Bachmann Building around nine or ten o'clock in the morning. I then went into the building and saw a heap of material through the center of the building; I went in to help get out Mr. Bachmann's office property, if any was left. I did not see any gasoline. I entered the building from the front on Main Street and climbed over a portion of the dirt and rubbish in order to see what we could do upstairs. I went back about a third of the length of the building, but did not go in the rear at all. In December, 1925, Charles F. Bachmann conducted his business in an office on Market Street—

over the Lyric Theater on Market Street. He did not conduct his business in the building on Main Street during the month of December, 1925; he moved out around Thanksgiving day. I fix this date by maturity of one of — notes made by Charles F. Bachmann and myself. In talking with Mr. Bachmann, about the 18th or 19th of November, 1925, he told me I would have to see him at his new office over the Lyric Theater on Market Street from now on. I had no occasion during the month of December, 1925, to attempt to get into the Bachmann Building on Main Street. There was a good, heavy lock, and a cylinder lock besides, on the front door of the building on Main Street. It had a cylinder or night latch. I would say that it did not require a key to lock this door; that is, the cylinder lock would not require a key to lock it, but the other lock would.

Thereupon, a lock was exhibited to the witness, and he testified that it was similar to the one at the front door of the Bachmann Building.

Charles F. Bachmann might have been up to the Riley Law Building after he moved out of the Main Street building. He might have gone up there to see his son, as his son had his office there. I think his son had the office there after Thanksgiving day, 1925.

No cross examination of this witness.

[fol. 96] JAMES J. MALONEY

Resides at Wheeling, West Virginia, and is engaged as a painting contractor and decorator. Is a member of the present City Council of Wheeling; and is familiar with Bachmann property on Main Street; was at the fire of the Bachmann Building on December 27, 1925. My attention was attracted to the matter by a young boy running down Main Street yelling "fire"; I then looked up the alley and saw smoke coming out of the Bachmann Building; I ran to the front of the building and looked in and tried to get in the doors. The doors were locked. Then witness parked car out of reach of Fire Department and ran back and by that time a truck and fire apparatus were pulling up. At that time the front of the building looked like a roaring

furnace. First place witness went, after jumping out of his car, was to rear of building. The reflection on the inside of the building was all over the place and it looked like the fire was shooting out the roof. I did not hear any explosions. I saw the reflection of the flames on the inside of the windows and the windows were not broken out when I first got there. I remained there from three to five hours, "at the building". The fire "was very, very hot, although it was a bitter cold night". Part of the time I could not stand in front of the building on account of the heat. At no time did I hear any explosions in the Bachmann Building or anywhere else. After I once went to the rear, I did not go back again. Firemen worked from front, back and on top.

The next morning after the fire, I went to the Palace Furniture Company's building which was located two doors above the Bachmann Building in which I was very much interested. The firemen were still on duty at the Bachmann Building "and people were afraid to go in". The building was still smoking. I went in the building as far as I could get giving the firemen coffee. "Two floors had caved in and the first floor bulged down". The roof and the next floor looked like they were all piled down on the first floor "where the roof had burned down, caved down, taking the next one and the next one, piling up on the next floor. The joists of the first floor looked like they had broken and gone down into the basement. Practically all [fol. 97] of the floors above the first floor were down and the first floor sagged down and looked like it struck the basement. I went in the building from the front on that morning but I did not go to the rear of the building. I did not see any gasoline cans on the first floor. I walked back from the front on the first floor as far as I could get to the place where the ice and water were piled up, handing a fireman a cup of coffee who was standing there squirting a hose down there.

While I was on the first floor I could see clear up through the building and I did not see anything that looked like sixty wooden barrels, either empty or filled with anything. I saw the roof go in from the Palace Furniture roof, on night of fire. In response to question as to what time witness showed boy how to turn in alarm, and first discovered, he answered "I would say half-past five or six o'clock in

the afternoon. It was on the Sunday following Christmas. I returned on the day following, that is, on Monday. I went to the building around nine o'clock in the morning.

Cross-examination:

The firemen were at the Bachmann Building all night. Witness has known Charles F. Bachmann for seven, eight or nine years, but has not spoken to him for three. When I could not get in front of the building when I discovered the fire, I went around to the rear at the alley. On the next day I went back on the first floor approximately twenty or twenty-five feet.

"The Court: From the front door?

A. Oh, no, I climbed up on that pile.

The Court: Were you ever on any of the other floors in back?

A. Oh, possibly a week after that—three or four days after that.

The Court: The next day you were not?

A. No, sir. That would cave in unless you had a ladder or something.

The Court: Do you know whether there was any floor standing in the back part?

A. There might have been a few boards on each side, or a few beams, that had not let go, or that might have broke in half."

[fol. 98] STIPULATION

At this point, it was stipulated by and between counsel for the parties that on the 27th day of November, 1925, the mail of Charles F. Bachmann was changed from 1312 Main Street in Wheeling, West Virginia, to the Riley Law Building in said City by directions given to the postmaster at Wheeling in writing and that thereafter the mail was delivered to Mr. Bachmann at 600 Riley Law Building.

ASHBY JACKSON

Direct examination:

Lives at Wheeling, West Virginia, and has been a member of the Wheeling Fire Department for thirty-four years.

Recalls the fire at the Bachmann Building on Main Street and attended it in my capacity as a fireman. The first fire company on the scene was the one of which I was a member. Elmer Faddis and Cahill were with me. My company began operations in the rear of the building on the alley. I should say that we got to the scene in about eight or nine minutes after the alarm.

"Q. What was the condition of the building in the rear as you discovered it when you got there eight or nine minutes after the alarm? What was the extent of the fire? How extensive and intensive?

A. When we got to Fourteenth and Market someone was standing out in the street. I was driving the truck. He waived me to go up the alley. I turned in the alley, stopped a minute for the boys to wrap the horse around the plug just below the alley. I drove up to the Bachmann building, and there was such a smoke and flames you could see inside through the windows and I drove past a little bit with the truck, so if anything happened, it would not burn the truck up, and pulled the hose out, and went into the rear doors. There was a big door and we forced those doors open and went in there. By the time we got in there one of the officers came in and said to me, "Go down to Fourteenth Street. They are having trouble connecting up". I came out and went down a few steps and met the [fol. 99] water coming in the hose. So I came back into the building then. We got in to about the elevator shaft, and the fire was falling down from the second floor. We tried to get up the steps, but the flame and smoke was so hot it forced us down. We had to go to the alley and go up over the roof on the upper side, through a window. We worked there awhile, and then got a big ladder up, and our company went into the second floor and we worked there the best part of the night."

"After the firemen got there, the fire seemed to increase for awhile, because it was so cold,—the water would freeze immediately into ice and we worked at a disadvantage for awhile. I never worked on a hotter fire. It was so hot it forced us down stairs and up toward the roof. We tried to get in the windows from the alley. I tried and spectators tried to break windows in with bricks so that we could get water on the flame."

I have been in the Fire Department thirty-four years and have attended a number of fires where there was gas or gasoline explosions in the burning building.

Thereupon the following question was asked this witness, over the objection of the defendant and answer returned:

"Q. What was the result on the windows where inside explosions occurred Mr. Jackson?

A. The windows would be blown out, glass shattered and very often the side of the building would be blown out."

The court overruled the defendant's objection to said question and answer and permitted the witness to answer the same in the hearing of the jury, to which action and ruling of the court the defendant duly excepted.

Speaking of the condition and sides of the building in the rear of the building the doors, windows and sides of the building were perfect when we entered it. We had to force our way into the doors and break the windows with bricks in order to get the water inside on the flames. We finally had to go on some adjoining roofs in order to get [fol. 100] water on the building, mostly because of the smoke which we couldn't stand. When we first got into the building we went toward the front of the building almost as far as the elevator shaft, before any of the floors fell from above. In trying to get the hose out into the alley at the rear the hose fell against the wall and among some old cans and made an awful noise. After getting the hose out into the alley I made an investigation, found some cans setting there with tops upside down. "They fell down where the hose pulled them over". There were two or three cans standing with tops on them. I kicked them and they sounded hollow. I then raised and shook them and there was nothing in the cans at all. I found no cans on the first floor other than these old cans with nothing in them. I stayed at the building until 3:00 o'clock the following afternoon and the rest of the company remained there. At that time the building was still smoking but the fire was about out. We went up the ladder to the third floor of the building before it caved in and remained there until morning. I only worked about the middle of the

building in the rear—"east side of the building next to the alley".

Cross-examination:

When I got to the rear of the Bachmann Building after the alarm the rear windows were closed and were not broken. Just a little bit of smoke was rolling out from them, probably because the casements were loose. I don't know what made the casements loose unless they were a little big and did not fit so tight. If there had been an explosion it would knock the glass out. There was not a thing wrong with the windows when we got there. We could shove them up and down. If there had been an expl-sion it would have twisted them. The windows may have been tight or they may have been loose. At any rate there was smoke coming out from the sides of the windows.

Thereupon counsel for the defendant attempted to interrogate this witness regarding certain alleged statements he had made in regard to the gasoline cans to Mr. Russell L. Furbee, one of counsel for the defendant Company, about a week after the Bachmann fire. It appeared that [fol. 101] the witness had then talked to Mr. Furbee about the fire while the latter was making an official investigation thereof in his capacity as Assistant District Attorney for the Northern District of West Virginia. The plaintiff objected to the examination of the witness as to any statements or disclosures made by him during such an official investigation, and the court sustained said objection, to which action and ruling of the court the defendant duly excepted.

ELMER FADDIS

Direct examination:

Is the same witness who has heretofore testified upon behalf of the defendant company. Along with Ashby Jackson, I reached the scene of the Bachmann fire eight or nine minutes after the alarm was given. I went in on the first floor as far as the elevator shaft, from the rear end of the building. I did not see any five gallon cans or cans of any kind. I never even looked around.

CHARLES MILLER

Direct examination:

Has been a member of the Wheeling Fire Department for eight years and worked on the Bachmann fire in 1925. I did not get there until about 6:00 o'clock the following morning and stayed there until away in the night of December 28, that is I was there all day Monday and until Monday evening. I was all over the building. I was on the first floor of the building, including the rear thereof, and I did not see any gasoline cans there.

I was all over the building, and helped digging around. I did not see any gasoline cans. The building on Monday morning seemed as though it fell in from the top—the top floors had all fallen in. Part of the roof had fallen in though there was a little bit still hanging. I was on the third floor most of the day and did not see any gasoline there.

[fol. 102] Cross-examination:

I went in the rear entrance of the Bachmann Building. That part of the building had been burned; it had burned all over. I didn't see any grain or sugar in that part of the building. As to condition at rear of building:

"A. It was kind of fell in,—of course, I was looking for fire. I was hunting where there was any fire to break out."

Examination by the Court:

I did not see any five gallon cans or any other cans on the first floor. In regard to what I saw on the third floor rear of the building, I was hunting for the places of the fire, mostly. I had a hose in my hand and was trying to put out the fire where I saw it. I saw a lot of stuff that fell in there. The third floor had fallen in pretty nearly all the way back to the rear wall, I would say within about four or five feet of it. There was a little shed where I was standing on the third floor—kind of a little roof over it. It had not fallen in there, but had fallen in all around. Where I was on the third floor, it seemed that there was only about four or five feet of flooring that had not fallen in but on the other side it seemed like the floor was up on the third floor. I worked on the third floor nearly all day and had only a space of four or five feet to

work on. It was dangerous. I did not see anything on the third floor except a lot of stuff.

STIPULATION

At this point it was stipulated upon the record that the mail carrier on the route that delivered mail to the Riley Law Building delivered mail there addressed to Charles F. Bachmann beginning November 27, 1925, and for the following six months.

Thereupon it was further stipulated upon the record that immediately prior to Thanksgiving day in November, 1925, the telephone service, the gas service and the electric light [fol. 103] service were cut off at 1312 Main Street, Wheeling, W. Va., at the request and by the direction of Charles F. Bachmann by the respective companies furnishing the same and that none of said services were renewed by Charles F. Bachmann or anyone else between that date and the time of the fire on December 27, 1925.

WILLIAM B. CASEY

Direct examination:

Is an attorney at law practicing at the Ohio County bar for twenty-four years with offices at No. 600 Riley Law Building. My office was in said building during November, 1925, and succeeding months. In November, 1925, Charles F. Bachmann and Carl G. Bachmann had offices with me there. After Carl G. Bachmann left for Washington in November, 1925, Charles F. Bachmann took charge of his office. Until Carl G. Bachmann returned, Charles F. Bachmann made his office in his son's office and was there practically every day. So far as I know Charles F. Bachmann transacted all of his business in that office and paid the rent to me.

LOUIS BROWN

Direct examination:

Has been a member of the City Fire Department of Wheeling a little over ten years and was present in that

capacity at the Bachmann fire in December, 1925. I got to the fire about 5:30 o'clock on Sunday evening and was in and out there until Monday morning. I was there practically all day Monday. I did not make any particular examination of the inside of the building, but went through it and looked around, pulling the hose in and out. I was on the first floor of the building and looked in the rear of the second floor. The roof had caved in and I couldn't get all the way through. I was also on what remained of the third floor of the building. The prohibition officers came to the building Monday afternoon, probably around 3:00 o'clock. I believe Mr. Prince, Mr. Smith and Mr. Heide were there. [fol. 104] I did not pay much attention to them as I was working and looking after the hose. I don't just recall whether the officers were on the third floor that day. Later I was at the Bachmann Building with these prohibition officers. I don't remember the day, but the Chief of the Fire Department told me to take a thirty-six foot ladder down there which I did. About 1:30 o'clock in the afternoon I put the ladder up against the building and then the prohibition officers went up there, Mr. Smith was the first one up and then I went up and then Mr. Doerr and another gentlemen. Mr. Prince was down in the alley. We throwed some stuff out of the first window from the Fourteenth Street side. Boilers, little pipes, and a whole lot of stuff. I only saw one boiler that day; I was in on the third floor of the building on the first day. I helped carry the boiler over to the window and we threw it out, with some burners. There were also several tanks that had little gauges on top of them. I carried one of those down and Mr. Smith carried the other down. After we got them all out in the alley, Mr. Prince suggested that we put them in the truck belonging to the Fire Department. We thereupon put the articles in the truck and took them to the County Jail and they were carried down to the basement part. I helped to carry the things. The boiler was all flattened out; it was bent and dinged. The roof had fallen on it. I did not see anything in the boiler. I did not see any gasoline on the third floor nor did I see any on the first floor.

JOSEPH P. SHAUGHNESSY

Direct examination:

Has been a member of the Wheeling City Fire Department for about ten years and attended the Bachmann fire. I heard alarm, went to hose house, changed clothes and arrived there about 6:15 Sunday evening and stayed there until 9:00 o'clock the next morning. When I got to the fire I tried to enter on the first floor but I couldn't get in. We had a ladder on an adjoining building and I went up this fifty foot ladder and we took a line up. Just as we got the line to the top, the roof fell in. It was a very hot fire, and [fol. 105] I can not say that I have ever in my experience seen a hotter fire than that at the time I got there. I was not able to get inside of the building until 2:00 or 3:00 o'clock on Monday morning. The two top floors of the building appeared to me to have caved in in the center and went through. Part of the rear end of the building and rear floors were standing.

I went in the front of the building the next morning about 7:30 but I was not in the rear of the first floor, was on the second floor a short time. I was on the third floor in the rear of the building and did not see any gasoline or gasoline cans. My attention was attracted to the fire and I never thought of gasoline or anything else. I did not see any gasoline cans on the third floor, and I was up on the fire wall, and after we had the fire under control there was a little fire in the corner and we took a small ladder and put it in the building. I went out of the building the way I went in.

Cross-examination:

It was a very cold day and the water froze very quicky as it was thrown upon the building by the firemen.

STEPHEN WALL

Direct examination:

Has been a member of Wheeling Fire Department for about eleven years. Arrived at the Bachman fire around 6:00 o'clock on Sunday evening. I couldn't get in the build-

ing as it was a roaring furnace—a hot fire. I stayed at the fire all night and until about 9:00 o'clock the following morning. I went into the front of the building on Monday morning about 8:00 o'clock. The building was then in bad condition as the roof was part down in the middle caved in from the middle came down in the middle of the floor. I was not on the second or third floors of the building and did not go back to the rear at all. I did not see any gasoline where I was.

[fol. 106] WILLIAM GUTMAN

Direct examination:

Is in the insurance business formerly in government service and resides at Wheeling, W. Va. In November and December, 1925, was soliciting insurance for Alexander R. Campbell and had been so engaged for some time. Is familiar with the Bachmann property on Main Street in Wheeling and was in 1925, and prior thereto. I was in the building probably two or three times every week before the fire.

"Q. Mr. Gutman, in conenction with your business with Alexander R. Campbell, the insurance man, tell the jury whether or not you had occasion to go down there for the purpose of making some change in an insurance policy occasioned by some change in the business that was going to be made there? Whether or not you were down there at that time?

A. Yes, sir, along early in 1925, I went down with Mr. Campbell.

Q. By Mr. Campbell you mean whom?

A. Mr. Alex R. Campbell, the man I worked for.

Q. The insurance man?

A. Yes, sir. I had some other business with Mr. Bachmann that morning. I told Mr. Campbell I was going down to see Mr. Bachmann, and he said "Wait, I am going down, I have to look over the premises on account of——"

Q. Tell the jury whether or not you accompaniel Mr. Campbell on that occasion?

A. I accompanied Mr. Campbell there and went there and met Mr. Bachmann.

Q. What did you see? What did Mr. Campbell see? What was being carried on there?

The Court: The witness can tell what he saw there.

Mr. Bachmann: State what you saw and what Mr. Campbell saw and where you saw the things that you are going to describe.

Mr. Furbee: He can not state what Mr. Campbell saw.

The Court: The witness can tell what he saw there.

Question withdrawn.

[fol. 107] Mr. Bachmann: What part of the Bachmann building did you go to on this occasion when you went there with Mr. Campbell?

A. Went to the office of Mr. Bachmann in the front of the building on the second floor, and met him.

Q. Who was with you when you went to this office with Mr. Campbell, and what occurred there?

A. Mr. Bachmann walked out with us, opened the door and went out and met a man by the name of Mr. Huff, who he said was running this oil business, I think it was—I think it was Eze, or some such name.

Q. Auto Eze?

A. Yes, Auto Eze. He called Mr. Campbell's attention to the various barrels of oils and different things, cans, and everything, and Mr. Campbell told him that he would have to safeguard himself,—he would have to go to work and have a can for the waste material—something in the way of a slop can, and also told him he would have to have receptacles under each of the barrels—the bungs of each barrel, to have something there to catch the oil—the drippings. There was a gas stove, and he would have to have a piece of zinc put under that stove. And from there we went to the third floor.

Q. Before you leave the second floor, you say Mr. Bachmann took Mr. Campbell out and showed him these barrels of oil and cans?

A. No; Mr. Huff did.

Q. Were you there at the same time?

A. Yes, sir.

Q. And Campbell was there besides you?

A. Yes, sir.

Q. I wish, if you can, you would tell the different kinds of oils that you saw there or that were mentioned or pointed out, as the kerosene, carbon oil, gasoline, grease.

A. They mentioned grease; they mentioned oil; they mentioned gasoline, and some kind of a lubricating oil. That is the only thing I can recollect.

Q. You went, I believe, from the second floor to the third floor. Who went from the second to the third?

A. Myself, Mr. Campbell and Mr. Huff.

Q. Do you know whether his name is Ira P. Huff?

A. No, sir, I couldn't tell you that.

Q. He is a man that was, at least, conducting the business and giving the directions?

A. Yes, sir.

Q. What did you see on the third floor?

A. I don't recollect what I saw.

[fol. 108] Mr. Guiher: I was waiting to make sure Mr. Handlan was through with this line of examination. This goes to the same extent that the Whitely evidence did some time ago. It involves the same proposition. I am going to make a motion, when he is through, to exclude this testimony. I will wait until Mr. Handlin is through.

Q. Mr. Gutman, Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 5, being insurance policies, one of the St. Paul Fire & Marine Insurance Company, and the other of the American Central Insurance Company, showing by their endorsements they were issued by Alex Campbell & Co., agents, each having attached to them what is called Form No. 4—a rider—that mentions the privilege given for "bottling automobile oils, offices and other mercantile business not more hazardous", and signed "Alex R. Campbell & Co." Do you know whose signature that is?

A. Yes, sir, that is Mr. Campbell's signature.

Q. I will ask you whether you know whether or not the visit of Campbell and yourself to the Bachmann property at the time you mentioned, had any connection with the putting on of these riders?

A. Yes, that is what he went down for. He was called. He told me he was going down to see Mr. Bachmann—that he called him up."

Thereupon, counsel for the defendant moved to exclude all of the quoted testimony of the witness Gutman afore-

said, relating to the visit of Mr. Campbell and himself to the Bachmann Building and the observations made there in connection with the materials kept on the premises and what was said and done in that respect, the motion to exclude going to each and every answer of the witness. The court reserved its ruling upon said motion for the time being.

I went down to the Bachmann Building on Main Street in the latter part of November or in December, 1925, and Charles F. Bachmann was not there. The building was locked and later I found he had moved to the Riley Law Building. Afterwards I saw Bachmann at his office in the Riley Law Building and visited there nearly every day. I met Charles F. Bachmann on Main Street on various occasions but I do not recall ever seeing him try to get into the Bachmann Building after he had moved his office to the [fol. 109] Riley Law Building. I was in the Bachmann Building the next day after the fire between 10:00 and 11:00 o'clock A. M. on Monday morning. I went in the front of the building for a few feet and afterwards went around to the rear. I was on the first floor of the building. I did not see any cans of gasoline and did not see anything. All I saw was the debris in the middle of the building and there was a mixture of everything. I couldn't tell what it was.

WILLIAM SCHELL

Direct examination:

Has been a member of the Wheeling Fire Department for about nine years. I reached the fire at the Bachmann Building between five and six o'clock on Sunday evening close to six o'clock. Only a minute or two after the gong sounded. I went to the front of the building and remained at the fire until about 10:00 o'clock the following morning. It was one of the hottest fires I have ever seen. The whole front of the building was on fire. We could not put our ladder up against the Bachmann Building and we put them up on the next building. Was at rear during fire—"all over it". I was on the first floor of the building about 5:00 o'clock on Monday morning but did not go in very far as the floors were falling. Asked if he saw any gasoline on first floor, witness said: "I did not see a bit of gasoline."

Cross-examination:

There was plenty of ice everywhere the night of the fire. I did not see any sugar in the rear of the first floor. I spent almost all the night in the adjoining building—that is the Zanetits Brothers Building. The next day we were around different parts of the Bachmann Building, but could not get into it very deep.

EDWARD F. DEIHL

Is a public accountant residing at Wheeling. Is City Councilman and formerly accountant with State Bank Examiner. I have been keeping Charles F. Bachmann's [fol. 110] private books for about nine years. At the time of the fire in the Bachmann Building, Charles F. Bachmann had his office at No. 600 Riley Law Building, and he had been there about a month. We vacated the building on Main Street, and I was in his office in the Riley Law Building on Thanksgiving morning, 1925, helping him to straighten out the office. He moved from the Main Street building on Thanksgiving day or the day before Thanksgiving, and on Thanksgiving morning I was in his new office in the Riley Law Building helping him to straighten up. From then on I was in his office in the Riley Law Building about two or three times a week. After the office was moved, it was necessary for us to go to the safe left in the Main Street building to get certain papers, as only the live books and papers had been moved to the new office. Bachmann had left two safes in his old office in the Main Street building. It became necessary for us during December, 1925, to go to the old office on two or three occasions in order to get papers. Mr. Bachmann and I went down on several occasions to the Main Street Building, but could not get in, as the building was locked. This was during business hours, around two o'clock in the afternoon. Also, one evening Mr. Bachmann and I went to the Main Street building and I tried the door, but could not get in.

I was in the Bachmann Building the morning after the fire between 10:30 and eleven o'clock. I looked in at the front and also looked in at the back, but could not get in the building. The building was still smoldering and water was being played upon the fire. I could see from rear of

building into the center of where the débris had fallen down into the alley. There were no twenty-five five-gallon cans of gasoline on the first floor. I did not go into the front of the building, because it was all covered with ice.

Cross-examination:

I did not see any cans of gasoline at the rear of the first floor of the Bachmann Building.

Redirect examination:

If there had been 25 five-gallon cans of gasoline in the [fol. 111] rear of the first floor of the building, I would have seen them.

Recross-examination:

I went up the alley in the rear of the Bachmann Building, and looked in either a window or a door, "there was an opening" and saw the heap of débris in the center, and upon that examination I did not see any cans of gasoline. I could not get inside the building and only went as far as the door. I could not get in on account of the smoldering fire, and water being played on it.

W. Barclay Johnson

Have lived in Wheeling, W. Va., for about thirty years. Is engaged in oil and gas business. Is acquainted with Charles F. Bachmann. In the last few days of November, 1925, and the month of December, 1925, Bachmann had his office in the Riley Law Building; he knows this because he was there nearly every day—we had business relations together. I was frequently in the Main Street property while Mr. Bachmann occupied it, probably three or four times a week for several years. We had business interests together. Bachmann left the Main Street building and moved to the Riley Law Building a day or so before Thanksgiving, 1925. I was in his office the last day he moved out of the Main Street Building, the day he took the last of his papers out. In December, 1925, between Thanksgiving and Christmas, Bachmann and I went down to the Main Street Building in order to get some blueprints of a

mine and a geology book which he had left in the steel cabinet in his office there. I wanted these blueprints and the book after he had moved out of the Main Street Building. We went down to the building one day to see if the people he had leased it to were in it. This was between Thanksgiving and Christmas. The building was locked and we couldn't get in. Also, one night Bachmann and I walked down Main Street together in the evening and in passing the Bachmann Building he stopped and shook the door just as he passed.

I was at the building the next day after the fire but was not inside. I looked in the doorway in front and then went [fol. 112] around and looked in the window at the rear of the first floor. I couldn't see very far into the rear of the building; there is a sort of room there—a partition which separated it—as I remember. When I looked in about 9:00 or 10:00 o'clock the morning after the fire I would say positively there was not any twenty or twenty-five five-gallon cans on the first floor. I think I would have seen them and I have no recollection of seeing it at all.

Cross-examination:

I looked in the window from the rear. I did not see any sugar; my recollection is that the room was empty. I looked from the window into the room, the window being broken in. I could see the entire room.

FRANK SCHIRRIPA

Direct examination:

Conducted wholesale grocery business next door to the Bachmann Building in 1925, at No. 1314 Main Street. I had been in business there two or three years before the Bachmann fire. After November, 1925, when Mr. Bachmann went to the Riley Law Building, plenty of people came down to the Main Street Building looking for Mr. Bachmann. They would go to the building but the place was closed, and they would come to me to inquire. I always directed them up to the Riley Law Building. I never saw Charles F. Bachmann inside of the Main Street building

after he left it in November, 1925, although I have seen him at the front door.

I saw the Bachmann fire and was in the building the following day. I walked in the rear of the building on the first floor a distance of about twenty or twenty-five feet and was there several times. I was curious to see what damage had been done. I did not see any gasoline cans. I didn't see anything like that. There were none there, I did not see any.

On the night of the Bachmann fire, I was rooming in the home of Mr. and Mrs. Forsch, on 14th Street. My room was on the side of Forsch's house closest to the Bachmann Building and I was in the room when the fire broke out. I [fol. 113] did not hear any explosion on the night of the fire. I just heard the fire engines and the whistles and the people running. I did not notice the Forsch Building jar or shake from any explosion.

Cross-examination:

There is a door at the rear of the first floor and then one went down about three or four steps—it is a little high. There was a partition there—kind of a back office, but when I went in the partition was destroyed. A lot of the débris had fallen there.

DAVID A. MCKEE

Direct examination:

I am an attorney practicing at the Ohio County Bar since 1906, and a former prosecuting attorney of the county. In the early part of December, 1925, I went to see Carl G. Bachmann at his office in the Riley Law Building, and found Charles F. Bachmann was there, Carl Bachmann having gone to Washington to attend Congress. I talked with Charles F. Bachmann on that occasion for a considerable time, visited him there frequently thereafter, probably two or three times that month. Charles F. Bachmann was occupying the office in the Riley Law Building at that time.

H. L. KIRK

Lives in Wheeling and was at one time mayor of the city and served two terms. Also served one time as City Man-

ager, from July 1, 1925, to July 1, 1927. Was formerly engaged in the wholesale grocery business and is President of the Wheeling Savings & Loan Association.

I arrived at the Bachmann fire a few minutes after it broke out. I was interested in the fire because of my official position and I stayed there until 1:00 or 2:00 o'clock in the morning. I then returned to the Bachmann Building on Monday morning around 8:00 and I visited the property at least half a dozen different times that day. The city had [fol. 114] 12,000 feet of fire hose in and about the building. It was a cold, bitter night and the hose lying on the ground froze stiff. I was interested in getting the hose to a warm place. I was in the building and on the first floor in the rear of the building. I went into the rear on the first floor about sixty-five feet to the place where the center of the building and floors had dropped down so as to make it impossible to get through. I was interested in ascertaining cause of fire and anxious about safety of the building.

I was in the building several times. I did not make any real thorough examination but I saw practically everything to be seen. I did not notice any gasoline cans on the first floor of the building in the rear and think I would have seen them if they had been there. I don't think there was any gasoline on the first floor, I didn't see any; if there had been any there, I think I would have seen it. I didn't see any gasoline cans.

Was in the wholesale grocery business for seventeen years until 1912, in the City of Wheeling.

Thereupon, the witness was asked by counsel for the plaintiff whether it was customary for a wholesale grocery to handle, among other things, gasoline, kerosene and oils, to which question counsel for the defendant objected. The Court sustained the objection upon the ground that the Bachmann Building on Main Street was not, according to the testimony, being used as a wholesale grocery store at the time of the fire, and that evidence of custom and usage was not proper. To this ruling of the Court the plaintiff duly excepted, and in order to complete the record the witness made the following answers out of the hearing of the jury:

"A. Well, in the days that I was in the wholesale grocery business, of course, there was very little gasoline, but

the wholesale groceries at those times did handle combustible materials—lots of it,—like powders and some oils. That is, they had various oils and things of that kind. In recent years, since they have done away with horses and are using trucks, the wholesale grocer while he does not sell gasoline, yet he has gasoline and oils and materials of that kind around his business. But a wholesale grocer does sell a lot of combustible materials like miners' supplies,—[fol. 115] powders, and things of that kind. Years ago when I was in the wholesale grocery business, a wholesale grocer sold most all the lamp oil. But lamp oil is gone, and there are other oils being sold by the wholesale grocer in place of the lamp oil.

Mr. Carl G. Bachmann: I want to preface that if the witness were permitted to answer, he would answer as he has answered.

Q. Under what circumstances did the wholesale grocers keep gasoline?

A. For the supply of their own trucks.

Q. Do they keep it in their building?

A. In the basement, as a general thing, or first floor—or rear of the first floor, usually. They carry not so much in the basement as on the first floor—usually in the rear of the first floor.

Q. What kind of containers do they keep it in?

A. Mostly cans, barrels."

Thereupon, the examination of the witness was resumed in the presence of the jury.

I had been in the vicinity of the Bachmann Building, at the corner of Twelfth and Main Streets, for several hours preceding the fire. I did not hear any explosion of any kind prior to the fire. About midnight after the fire had started I heard several explosions in the adjoining building of Zarnits Brothers Grocery, but not in the Bachmann Building; there must have been eight or ten.

Cross-examination:

I did not see any cans of gasoline in the rear of the first floor of the Bachmann Building. I did not see any cans at all there. Nor did I see any sacks of sugar.

E. W. EXLEY

Direct examination:

Is manager of the Palace Furniture Company which at the time of the fire occupied the second building north [fol. 116] of the Bachmann Building. I was at the scene of the fire all night and the following day. I went into the Bachmann Building the day after the fire because I wanted to see what had been the cause of the fire if possible. I went in the back door on the first floor and went in as far as I could go. I could only get about one-third of length of building, which is about 120 feet long because the floors above had fallen through. I did not see any gasoline there nor do I remember of any gasoline cans. The only thing that I saw there was rubbish from the fire.

All that I recall seeing in the building was the rubbish and things like that that had fallen down from the other floors.

WILLIAM JASPER

Direct examination:

I am engaged in the structural and ornamental iron business and am related to the plaintiff in this case by marriage. Charles F. Bachmann left the office in the Bachmann Building on Main Street in November, 1925, around Thanksgiving and moved to the Riley Law Building for about four or five months. I was in his office in the Riley Law Building and I went on several occasions to the Main Street Building and could not get in. I passed the Main Street Building with Mr. Bachmann a couple of times and he was expecting that a tenant to whom he had rented the building would be in there, and he was wondering why the tenant hadn't taken possession of the property with his goods. I never saw Bachmann try to get into the building because he said he had no keys. I saw him try door over a period of two years. He was particular about his property no matter who had it. During the month of December, 1925, while I was with Buchanan I saw him try the Main Street door on an average of once a week to see whether it was open. The door was never open so he could get in.

The front door had either a Corbin or Yale lock—a rim-latch night lock.

The witness was then handed the same lock which had theretofore been shown to the witness David Tyler, and [fol. 117] the reporter, at the suggestion of the Court, identified the lock as Plaintiff's Exhibit No. 10—Lock. The witness stated that this was the type of night lock to which he had reference.

There was no other key operated lock on the Main Street door. There was a regular hand thumb lock used on all doors of that type just to gain access when the night latch was set. It was not necessary to have a key to open that type of lock, nor is it necessary to have a key to lock it after the door is open. When you are ready to leave, the latch is set and it will lock itself by the action of pulling the door shut. I was in building on night of fire.

I was in the Bachmann Building the day following the fire, about 1:00 o'clock in the afternoon. I went into the building on the first floor in the rear a distance of thirty or thirty-five feet. The upper floor had fallen in and it was hardly possible to get around in there. I was there on first floor in rear for about a half hour. I did not see any gasoline or any gasoline cans.

GEORGE H. MILLER

Direct examination:

Is engaged in the moving and storage business. I had a furniture business three doors south of the Bachmann Building and also conducted my express business therefrom. In November, 1925, I moved Charles F. Bachmann's office effects from the Main Street Building to the Riley Law Building. I never saw Bachmann thereafter in the Main Street Building.

The day following the fire I went into the rear on the first floor of the Bachmann Building about half past 9:00 o'clock in the morning, to a distance of twenty-eight or thirty feet. Because of conditions there I could not get any further. I did not see any gasoline cans or any gasoline

there and I was in a position to see them if they had been there.

[fol. 118] EDWARD BACHMANN

Direct examination:

Has lived in Wheeling entire life, fifty-one years. Is a brother of Charles F. Bachmann and brother-in-law of the plaintiff in this case. After the fire I was in charge of the crew which dismantled the Bachmann Building on Main Street. I took off the lock which was on the front door of the building. The lock which has heretofore been identified herein as Plaintiff's Exhibit No. 10—Lock, was the one which I took off about two or three months after the fire. John Brewster was with me at the time. This lock has been in my possession ever since. The front door was painted green half way up and there is still some green on the lock. It is an old lock and must have been on there for years; I have seen the lock hundreds of times on the door. This lock fits on the lower door. The upper door is bolted top and bottom and *and* you would have to put your key in to unlock it in order to get in the building. If you were inside and wanted to come out and lock the door, you would take your key and unlock the door and stick it in your pocket. The minute you snapped the door shut it locks itself. If you wanted to leave the door unlocked you set the latch. You could simply slam the door and it would lock itself. This lock was on the front door of the Bachmann Building on the night of the fire and had been there continuously for years before.

At this point the lock identified as Plaintiff's Exhibit No. 10—Lock, was introduced in evidence and so identified. It is stipulated and agreed that counsel for either party may exhibit this original lock in the Appellate Court, if desired.

I got to the fire about half an hour after the alarm and it was pretty hot. I stayed there until about midnight and returned the following morning around 7:00 or 8:00 o'clock. The fire had gutted the building. The fourth floor, or loft, was partly burned down and some rubbish and furniture

was all hanging down. I would estimate that about forty- [fol. 119] five feet of the fourth floor remained in its original form. This fourth floor extended back from the front about one-third of the depth of the building. After the fire the third floor was standing to a point about twenty-five feet from the rear and then it was practically all down, up beyond the elevator, except for twelve or fifteen feet at the front of the building. There were two safes there. I immediately after the fire took precautions to prevent these large safes from falling down but this was not on Monday. On Monday I went all through the building, including the first and second floors; the water was running—I could not climb up. I put up a forty foot ladder in order to get on the 4th floor. There was no gasoline or gasoline cans on the first floor. I crawled through the first floor and could see everything there. There were some barrels, about forty-two, on the third floor; you couldn't get any barrels on the fourth floor. I drained the barrels, which contained water.

"Q. To what extent was the water frozen—how much of it was frozen?

A. Some of the barrels,—the expansion of the ice bursted the hoops. They formed a scum around the ice, possibly an inch thick, to hold the water. In order to get on there I chopped away in the ice with my ladder and leaned my ladder against it, and bored into the first three or four barrels, as far as I could reach from my ladder, and let the water drain, because I was afraid. An additional ten pounds would cave the whole thing down and I might kill myself.

There was no mash of any kind in the barrels, it was all water. I actually counted forty-two barrels. I afterwards broke these barrels up when I cleaned the building out to get the quantity in the truck. I did not see the stills or whatever they were on the third floor, they had dumped them out into the alley. They were dumping them out when I got there."

I couldn't get up to the place because the firemen were working there.

They were dumping the stills out of the building by just pitching them out of the windows. I did not see any gasoline or cans of any kind on the third floor of the building.

About Thanksgiving, 1925, Charles F. Bachmann left the [fol. 120] Main Street Building and moved up to his son's office. I am able to fix it at Thanksgiving as we had a lot of business that I look after. I look after all the property back and forth all the time. Carl Bachmann, the son, left on Thanksgiving Day and Charles F. Bachmann occupied his office until Carl came back from Washington in June or July, 1926. Carl's office was in the Riley Law Building. I was with Charles F. Bachmann frequently after he moved out on Thanksgiving Day when he tried to get in the Main Street Building, both by night and day and probably three or four times a week.

I was frequently in the Bachmann Building on Main Street when the business was being carried on there by Huff and others. Various oils, gasoline and stains were used in the Auto-Eze business conducted there.

(Counsel for the defendant objected to and moved to strike out the testimony of this witness regarding the materials used in connection with the former business carried on in the building. The court reserved its ruling.)

The fire at the Bachmann Building was very hot. For years prior to this fire, the building had been used for a grocery, produce and commission business. The principal business for the last fifteen or sixteen years had been the wholesale produce business. There was considerable dirt which would accumulate from potato sacks, etc., but there was nothing inflammable there.

JOHN BREWSTER

Direct examination:

I assisted Edward Bachmann in dismantling the Bachmann Building on Main Street and in removing the debris therefrom. There was a night latch on the front door of the building. The lock introduced in evidence here as Plaintiff's Exhibit No. 10—Lock, is the same one which was on the front door of the building, because I helped to take it off. I recognize it because of the green paint on it which was the same as the door.

[fol. 121] EDWARD T. ROSE

Direct examination:

Was a member of the Wheeling Fire Department for sixteen years and served as chief of the department for eight years. During my sixteen years of experience I have attended many fires of considerable magnitude. I reached the Bachmann fire about a half hour after it started between six and seven and remained there about three hours. It was a very serious fire, looked to be about the south wall and was awful hot, blazing through the roof, it was a pretty hot fire. In the course of my sixteen years' experience, I have seen thirty or forty gasoline fires—that is where there was explosions of gasoline in the burning building. Whenever we knew there was gasoline about a fire we would be very careful. If the fire got close to the gasoline it would always burn up.

Thereupon, the following proceedings were had within the hearing of the jury:

"Mr. Handlan:

Q. In order to present the matter concretely, Chief, I will now ask this question: You having had the experience you have had, with the Wheeling Fire Department, being present at the December 27, 1925, fire, at the property on 1312 Main Street, having stayed there for about three hours and noted the intensity of the fire as it had progressed up to that time, what in your opinion would have happened to the cans of gasoline, or how would the fire *would* have affected the cans of gasoline, if there had been a five-gallon can of gasoline on the third floor located about twenty, twenty-five or thirty feet west of the east wall, and there had been twenty-five five-gallon cans of gasoline on the first floor located about twenty-five or thirty feet, approximately west of the east wall, the cans being tin cans, square in [illegible] five gallons in quantity, and capped with screw tops, [illegible]t would have happened to that gasoline in that fire as you saw it?

Objected to.

[fol. 122] The Court: Now, state the grounds of objection.

Mr. Guiher: We think it is an improper question. We

do not care to argue. It is so speculative, we think, that we think it is highly improper.

The Court: The chief may answer that question, giving his best judgment, which is the result of sixteen years as a fireman, eight years as chief of the Wheeling Fire Department, and having been on the scene and observed the fire, and the conditions surrounding the same,—he may give his opinion as to what would have happened, for what it is worth.

Defendants, by counsel, excepted to the ruling of the Court.

A. My opinion would be that the gasoline would have exploded. It could not have stood that heat.

Mr. Handlan: Now, Chief, if there was on the third floor of the building and near to where the five-gallon can was alleged to be, as I have described, its position in my question, and there were two gasoline compressors each being filled about half full of gasoline, and each of some twenty to twenty-five gallons capacity, and there were on the third floor,—about twenty-five to thirty feet west of the east wall, what, in your opinion, would have happened to those gasoline compressors if they had that much gasoline in them?

Objection. Overruled. Exception by defendant.

A. I think they would have exploded, too."

The defendant duly objected to the foregoing questions, and each of them, but the Court permitted the said witness to answer the same in the hearing of the jury, to which action and ruling of the Court the defendant duly excepted.

Cross-examination:

Gasoline will burn when it is open and it will explode when it is closed. I do not know at what temperature gasoline would explode. This was a very intense fire. If gaso- [fol. 123] line should spread over the floor, and form a gas, it would explode if you touched a match to it. Gasoline will explode if it is confined. If you take gasoline and spread it out on the floor and touch a match to it there would be a puff. If gasoline is placed in an open bucket

or receptacle and a match lighted to it, there would be a puff when the gasoline first lights and then it would burn.

It was a very cold day and the water poured upon the building froze. It was pretty close to zero that night. I do not know at what temperature gasoline freezes. I never knew of any alcohol freezing. I do not know what mixture of gasoline vapor, or what mixture of gasoline and air is necessary in order to have an explosion.

At this point counsel for the defendant renewed their motion to exclude and strike out the testimony of the witness Edward T. Rose, objected to as hereinabove noted, but the Court overruled the motion and the defendant duly excepted.

DR. R. J. HERSEY

Direct examination:

Has been a physician in Wheeling for twenty-five years, and has known Charles F. Bachmann about that long. Prior to November, 1925, I was in the Bachmann Building on Main Street almost daily for a couple of years, because I was associated with Bachmann in different lines of business, and during the last year before the fire I had a desk in Bachmann's office. Bachmann left the Main Street building on Thanksgiving day, 1925, and thereafter had his office in the Riley Law Building until his son returned from Congress, a period of approximately six or seven months. I was in his office in the Riley Law Building almost daily.

I remember seeing Mr. W. S. Smith of the Auto Sales Company in Bachmann's office on Main Street prior to the time Bachmann left there. I remember that they were fixing the elevator the day Smith came in, and he had to walk up to the third floor. This was sometime early in November, 1925. I overheard the discussion between Smith and Bachmann, but did not know the details of it. [fol. 124] I heard Smith say that he was up there in regard to his lease. I do not recall seeing Mr. W. S. Smith at Bachmann's office in the Riley Law Building after he moved up there. After Bachmann moved to the Riley Law Build-

ing all of his business was conducted there; he did not go back to Main Street building to conduct his business.

After Bachmann left the Main Street Building I was looking for some papers that were important to me and as he could not find them in the Riley Law Building, I suggested that they might have been left in one of the safes in the Main Street Building. Bachmann had no key, and he said I will go down with you and see if we can get in, and so we went down there I would judge about eight or nine times, as we frequently went by about the lunch hour, on way to brokerage office, and we would try the door and look in the window, but were never able to get the papers until the safe was recovered after the fire. During the period from Thanksgiving time to the time of the fire, Bachmann was not able to get into the building when I was with him.

I went down to the Bachmann Building about ten o'clock the morning after the fire. I was interested to see the condition of the safe that my papers were in. I did not go into the building that day, but looked in the best I could. I went to the rear of the building and looked through the window at the rear of the first floor, and what was left of the door there. I could see right up to the mass of débris which had fallen down from the upper floors into the center of the building, and you could see through to the upper floors in front. When I looked through the rear of the building I did not see any gasoline or gasoline cans.

Prior to November, 1925, I recall a man named Varisca coming to the Main Street building. He wanted to rent the building from Bachmann. I saw him in the office once and coming out of the building as I was going out a couple of times. This was just before we left the Main Street building at Thanksgiving time. I never heard anything definitely going on between this Bill Varisca and Bachmann except that Bachmann was negotiating with him for the renting of the building. Bachmann said he would not do it until he had surety for his rent and that he wanted to [fol. 125] have three months payment in advance to apply on the end of the lease. The time he was in the office that I recall there appeared to be a question in Bachmann's mind as to the surety of the rent for the building. Mr. Harry Meyers, General Manager of the Carey Roofing Company, of Wheeling, on several occasions was negotiat-

ing with Bachmann for the renting of the building, and they had their engineers or architects come from the principal office in Cincinnati to measure up the building and see if it could be utilized and remodeled to suit them. I do not know what rent Bachmann asked Carey Roofing Company.

RALPH W. SNYDER

Direct examination:

In the contracting business in Wheeling. I went to the Bachmann Building the morning after the fire about eight o'clock, because I knew of the fire and I was looking for the job of replacing the damage that had been done. Also, I made a trip to Charley Bachmann's office which at that time was in the Riley Law Building. When I got to the building that morning everything was covered with ice. I went around to the alley in the rear and looked through the windows towards the front of the building to ascertain how much damage had been done. The first impression that I got in viewing the building was that it would be necessary to replace at least the second and third floor; they were all caved in towards the center of the building; the only remaining parts were towards the front of the building and a small portion towards the rear. By all appearances the building must have been empty at the time of the fire, because on the first floor all that was there was débris from the timber that had fallen from above. I did not see any gasoline on the first floor nor any gasoline cans, nor any five-gallon cans of any description. I did not see anything there with the exception of the floors that had caved in.

Cross-examination:

I did not see any bags of sugar or bags of rye and grain. I did not see anything except débris.

[fol. 126] M. C. KINDELBERGER

Direct examination:

Was for twelve years Captain and Assistant Chief of the Wheeling Fire Department, and was connected for thirteen years with the State Fire Marshal's office. I got to

the Bachmann Building about five or ten minutes after the alarm was sounded, and stayed there probably an hour or more. I made frequent trips back and forth up until probably eleven o'clock, but did not stay very long on account of the weather. It was a very intense fire. In the course of my experience with the Wheeling Fire Department and the State Fire Marshal's department, explosion of gasoline in fires have come under my observation a number of times.

Thereupon the following question was propounded to the witness by counsel for the plaintiff and answer returned thereto over objection of the defendant:

"Q. Now, Mr. Kindelberger, if there had been in this building on the third floor a five-gallon can of gasoline, located about twenty to twenty-five feet west of the east wall, and two gasoline compressors, each containing a capacity of twenty to twenty-five gallons of gasoline, and each about half full of gasoline, on the third floor, located near this five-gallon can, and about twenty-five to thirty feet west of the east wall; and twenty-five five-gallon cans of gasoline down on the first floor, located between twenty and thirty feet, approximately, west of the east wall, the gasoline cans that I have described on the first floor being square tin cans,—ordinary gasoline cans, with screw caps for their tops, what, in your opinion would have happened to that gasoline if it had been there, as a result of that fire?

Objected to.

The Court: The witness may answer, from his experience as an expert, as to what in his opinion——

Mr. Handlan: Answering the question, in your judgment and experience in the fire department.

[fol. 127] Objection. Overruled. Exception by defendant.

A. My opinion is that it would have exploded."

Counsel for the defendant objected to the foregoing question, but the court overruled said objection and permitted the witness to answer the same in the hearing of the jury, to which ruling of the court the defendant duly excepted.

ASHBY JACKSON

Direct examination:

Is the same Ashby Jackson who testified before in this case. There were several streams of water, at least six

or seven, playing upon the fire at the Bachmann Building in the rear during the height of the blaze, and a couple on the roof. Most of the streams we tried to get direct to where the fire was at. Some of them were working from the top down through and two in the alley playing on the windows in the second and third floors. Most of the fire seemed to be near the center of the building as near as I could judge from the back. There were at least three companies working over on Main Street and probably more. Most of the streams of water were active until around seven or eight o'clock on the following morning, and some of the streams were kept there for a couple of days. All of the fire companies were there from about six o'clock in the evening on Sunday until midnight or after. It was near five when we got the alarm.

It was awfully hot back in the alley where I was working. It was very cold and the water would come down and form ice. It had broken through on the side of the window, and the heat and smoke were so strong we couldn't stand it. The heat set some of the buildings on fire across the alley, which is twelve to twenty feet wide. The building on which we were on the roof stood back a little bit—ten or twelve feet. The buildings across the alley which caught fire were somewhere around twenty-five or thirty feet away from the Bachmann building.

I have been on the Wheeling Fire Department for 34 [fol. 128] years, and practically all that time in the Chemical Company. Our Company is centrally located and we attend more alarms than any other company in the City. I have attended a good many fires during that time in which there were gasoline explosions or gasoline in the building that burned up.

Thereupon the following proceedings were had during the direct examination of this witness by counsel for the plaintiff:

"Q. If there was a five-gallon can of gasoline on this third floor of this building during all the time that the fire was in progress, and there were two gasoline compressors also on the third floor, twenty or twenty-five gallon capacity, and each approximately about half full of gasoline, and these compressors and this five-gallon can

would be located on that third floor from approximately twenty to thirty feet from the east wall, west from the east wall towards the river, on that third floor, and with reference to one another were located from five to eight feet apart, and there was also twenty-five five-gallon cans of gasoline on the first floor, which was there during the entire progress of the fire, from your experience as a fireman,—and assuming taht these twenty-five five-gallon cans were to the rear rather than to the front—and they were possibly twenty-five to thirty feet west of the east wall on that first floor, from your experience as a fireman——

The Court: Mr. Handlan, I believe you have not stated whether or not those cans were closed?

Mr. Handlan (continuing): —and that the cans of gasoline on the first floor and the can of gasoline on the third floor were closed or secured with a screw top, and that the compressors were topped and practically tight, what in your opinion would have happened to that gasoline in those compressors and in those various cans I have described, as the result of that fire, as you saw that fire that night?

Objected to.

[fol. 129] The Court: State your grounds of objection.

Mr. Guiher: This is the same objection we have had before.

The Court: Mr. Jackson, for thirty-four years a fireman, located in the central part of Wheeling, having attended more fires, possibly, than any other company in Wheeling, will be permitted to give his opinion as an expert.

Mr. Handlan: What, in your opinion, would have happened to that gasoline?

The Witness: That gasoline, Mr. Handlan, would not stand that heat.

Q. How is that?

A. That gasoline you speak of would not stand that heat.

Q. What would have occurred?

A. It would explode. That would mean we would know it, because it is loud. You can see the flames, and there is

no use putting water on gasoline. It simply helps it. It don't put it out.

Mr. Guiher: We move to strike out his several answers purporting to give an expert opinion on this subject, and each of them.

Motion to strike overruled. Exception by defendant."

The defendant objected to each of the foregoing questions and answers, and moved to strike out the same, all of which objections were overruled by the court, and the defendant duly excepted as to each question and answer.

IRA P. HUFF

Direct examination:

Lives at Kenmore, New York. In 1925 I was located at Wheeling, West Virginia, in the business of manufacturing automobile chemicals. At one time my business was carried on in the Bachmann Building on Main Street. Bachmann told me I could go into his building. I was present at the building when the representatives of the [fol. 130] different insurance companies came down and inspected the business for the purpose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman, and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rock along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some vegetable oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflamability. Based upon this information, we were instructed to put dripping pans under each spigot on the drums,

and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this. I was in the Bachmann Building conducting this business from about June 1, 1925, until November 1, 1925. One day Charles F. Bachmann and I were sitting in the office in this building when a gentleman came in. I left the office and saw Bachmann taking him through the building. I later learned that this was the man who got the lease. I saw him in the building four or five times. The first time was in the early part of September, and then again about the middle of September, and then again in the later part of September. I was present when they were talking about the building and this man was trying to rent it. Bachmann was asking Three Hundred Fifty Dollars a month as rent, and the man was always ready to pay that amount of money.

After this man had been there around the first of September inquiring about the building, Mr. Meyers from the Carey Roofing Company, came in and asked if the building was for rent. Bachmann informed him that it was and that he was asking Three Hundred Fifty Dollars per month. Meyers said that they were having to vacate the building [fol. 131] where they were and that "this offers us the best location". Bachmann then took Meyers through the building. Meyers asked about a number of little changes, and when he came back to the office said that he would have to take the matter up with the agent at Cincinnati, Ohio. I heard Bachmann talk about this matter over the telephone on a number of occasions. Meyers came back again with the rental agent and a carpenter about fifteen days after the first trip and they went through the building very carefully and asked if certain changes as to the entry or steel beam across the front could be made. Bachmann assured them that the changes which they suggested would be made and Bachmann informed them that the rental would be Three Hundred Fifty Dollars a month. Bachmann agreed to give them a lease for five years.

The man who first came in as I have testified finally got the lease. It was signed prior to November 1, 1925, but I can't give the exact date. It was actually delivered on the last day of November, 1925, at the Riley Law Building,

Bachmann, the man who leased the building and myself being present. At the same time the keys to the Main Street Building were delivered to the new tenant. I gave him the key that I had and Bachmann gave him his key. I came in just after the transaction was closed. Bachmann told me in front of the tenant that the latter had paid him Three Hundred Fifty Dollars for the month of December, and had put up the additional amount of Ten Hundred Fifty Dollars as security for three months rent. Also, I recall that this foreigner paid a month's rent to Bachmann to cover the month of November, 1925, even before the lease was signed. This payment having been made in the Main Street Building.

Bachmann occupied the building on Main Street until about Thanksgiving time, 1925, and he then moved to the office of his son in the Riley Law Building, where I visited him thereafter every day and sometimes twice or three times daily. I was with Bachmann on several occasions when he attempted to get in the Main Street Building after that and he could never get in. Also, I myself looked in many times after that and could not see a thing; the building was clear of everything so far as could be seen. I tried to get in the front door myself in order to get two drums [fol. 132] belonging to the Freedom Oil Company for which I was being charged while they were out and which I had left there when I moved out just before November 1, 1925. I was never able to get the drums.

During the five or six months that I carried on my business in the Bachmann Building, I usually used the front door on Main Stre-t. This door had a rim lock and I can identify the lock as being the one which has been introduced in evidence in this case as Plaintiff's Exhibit No. 10—Lock. When I came out this door and intended to lock it it was not necessary to insert a key or turn it; I just pulled the door to and the lock would snap.

I went to the Bachmann Building the next morning after the fire between 8:00 and 10:00 o'clock, and went into it from the rear on the first floor as far as I could go, which was about thirty-five or forty feet. I would not be definite about that. There were positively no gasoline cans or gasoline on that floor. The ceiling of the first floor of the building was of metal and it had become so hot from the fire that it had charred the timber that held the first floor

until the nails pulled out and it sagged down. The metal plates had sagged in numerous places and the solder was melted off. This condition existed in the ceiling on the first floor and practically back to the rear door. I saw nothing with respect to the condition of the floors of the building, resulting from businesses that might have previously been carried on there which would render them *in*flammable or combustible.

Thereupon, counsel for the plaintiff asked the witness the following questions:

"Q. I do not mean in the nature of cans or stuff or articles sitting about on the floor. But I mean what condition the floors themselves were in before the fire as to oil being on the floor or gummy substances or candy from the produce business or anything of that kind if you noticed?"

To which question the defendant objected, and the Court sustained the objection, to which action and ruling of the Court the plaintiff duly excepted.

[fol. 133] Cross-examination:

I had a fire myself in Wheeling in a building owned by Charles F. Bachmann and I now have at least two or three suits pending against insurance companies by reason thereof. Mr. J. B. Handlan, one of counsel for the plaintiff in this case, is counsel for me in my cases. James M. Guiher, of counsel for the defendant in this case, is of counsel for the insurance companies which I have sued.

Thereupon, the following proceedings were had during the cross examination of this witness by counsel for the defendant:

"Mr. Guiher:

Q. Mr. Huff, I will ask you if on or about the 6th day of July, 1928, I did not examine you under oath in connection with the fire which you had on the Island, during the course of which I interrogated you regarding the materials and apparatus that you used in this process of bottling automobile oils?

Objection. Sustained. Exception by defendant.

The jury was here excluded from the court room, and the following proceedings were had in the absence of the jury:
The last question was read.

The Witness: Yes, you did.
Mr. Handlan: We move to exclude the answer.
The Court: Suppose you let it go through until we get through. This is without the hearing of the jury.
Mr. Handlan: I did not want the Court to think we were waiving anything.

Mr. Guiher: Mr. Huff, during the course of that examination, did I not ask you if in your process of bottling automobile oils, you used any gasoline?
A. Yes, sir.
Q. Did you not say no?
A. Because the conditions were different.
[fol. 134] Q. You admit that you told me at that time no you did 't don't you?

Mr. Handlan: Where do you mean used gasoline—at the Bachmann building or on the Island?
Mr. Guiher: I asked him about his process. I did not understand his process to be changed. He can make any explanation he wants to.
The Witness: Yes."

The plaintiff having objected to each of the foregoing questions and answers, and the Court having sustained the same, the said questions and answers were each taken out of the hearing of the jury and the defendant duly excepted to the action and ruling of the Court as to each question and answer.
The jury here returned into Court.

I had a hot plate in the Bachmann Building, in my business, which was heated with natural gas. I did not manufacture lubricating oils in the Bachmann Building. The manufacturing process which I conducted there included soap, polishes, certain kinds of greases, and penetrating oil which is used to penetrate into a crack or rusty nut—"a nut loosener" as it is called.

Thereupon, counsel for the defendant moved to strike out and exclude that part of the testimony of this witness

Monday or Tuesday morning. I wanted to find out from Mr. Prince what he knew about the condition of this building and what facts he knew about the case. We went into the Marshall's office and sat down and were there possibly ten or fifteen minutes and during the course of the conversation he said there was a five gallon can of gasoline that he had found on the third floor; I asked him what was done with this can and he said it was brought up here to the Federal Building and put in a room in the prohibition headquarters. Prince said that he did not know what became of this can as it had been a year ago, and that he would have to look it up in his notes. During the progress of this trial I talked again with Mr. Prince in the court room and [fol. 137] asked him about this can of gasoline Thursday or Friday afternoon. He said he had examined his notes and that he now recalled that he took the five gallon can of gasoline and used it himself. In reply to my inquiry as to why he did not tell me on the first day, he said he had refreshed his recollection from his notes.

I was at the fire until about midnight and again the following morning about eight o'clock. I had brought my family from Washington to Wheeling to spend the Christmas Holidays and we were staying at Charles F. Bachmann's home. We were eating supper when the alarm came in. I did not attempt to go into the building and was not on the first floor or any of the other floors. I did climb up the ladder that led to the third floor and saw nothing in the way of gasoline or stills or anything of that kind. I did not look for them but just merely climbed up the ladder to look through into the building. The building was all covered with ice and the floors were fallen in.

CHARLES F. BACHMAN

Is the husband of the plaintiff, who has testified before. Has known defendant's witness George H. Hastings for thirty years. Denies that I come out of the front door of the Bachmann Building about four or five days before the fire, and turned the key, putting it in my pocket, as heretofore testified by Hastings. The lock heretofore introduced in evidence as Plaintiff's Exhibit No. 10—Lock, is the same one which was on the front door of the Bachmann Building

at that time. It is a snap lock and does not require the turning of a key to lock it. The door locks itself by being shut. This lock had been on the door for twenty years or more.

From November 30, 1925, until the time of this fire and after the fire, I did not have a key to the Main Street Building and was never in it. I had given Varisca my key and Mr. Huff had given him his at the same time, on November 30, 1925, at the Riley Law Building. At various times from Thanksgiving Day to the time of the fire in 1925, I tried to get into the building. I went down several times with Edward Diehl and Dr. Hersey, who have testified here, to get some papers and also with Barclay Johnson to get a blue [fol. 138] print and map and Ed. Bachmann, and was never able to get in. I usually went by the front door to brokerage office in morning and at lunch time and often tried the door when nobody was with me. I tried to get into the building the day before the fire and also looked into it on the first floor. I could see clear through the building on the first floor and there was no obstructions at all. There were no gasoline cans on the first floor any day before the fire.

Is acquainted with Mr. W. L. Smith, connected with the Auto Sales Company, who has testified here. Smith is mistaken about having talked to me at my office in the Main Street Building between December 1st and December 10th, 1925. He did not talk to me during the month of December in that building; I had no occasion to talk to him and had moved out of this building. He did talk to me about his lease on this building in the early part of November, 1925, before I moved out. I think Dr. Hersey was with me in the office when Smith came in. I never was in the Main Street Building or talked with Smith there after Thanksgiving Day, 1925.

I never knew of any still, gasoline or any of these other things being in the Main Street Building and never saw any. Nothing occurred that would cause me to suspect these things or that would have put me upon inquiry about them.

Immediately after this fire occurred I employed people to hunt for the tenant. As early as 8:00 o'clock the following morning after the fire. I never could find out or learn anything about him.

It was my custom to walk up and down Main Street going to the brokerage office as well as for other purposes, and I never detected any odors of whiskey, liquor, mash, or similar fumes. I did not know of the presence in the Main Street Building of any of the apparatus, attachments, gasoline compressor, gasoline cans, mash barrels, mash, corn sugar, or any other article mentioned by the witnesses for the insurance company in this case, nor ever saw any of them. The building in which Mr. Huff had his fire was owned by my daughter, Adelaide Stobbs; I never owned it.

I was in the rear of the building on the first floor about 8:00 o'clock the morning following the fire. I went in about forty or fifty feet and even climbed up on the rubbish. The fire was so hot that it had melted the nails on the [fol. 139] corrugated metal ceiling so that it was all hanging down. There were no gasoline cans on the first floor of the building when I got there that morning at eight o'clock. Prior to my leasing of the Main Street Building the back door had no lock on it. It had slats nailed over the door. When talking about leasing the property I had a carpenter put a new lock on and to repair the door; that is the alley door in the rear. One of the keys was left in the rear door on the inside, and the other hung on a nail on the jamb of the door back of the door when opened. These keys were left there when I went out of the building. I do not know who got them. The lock on the rear door was a big old-fashioned lock. I had no keys to get in the building by either door. So far as I know there was no place to enter this building except the alley door and the front door at Main Street.

Cross-examination:

I do not know what moonshine mash smells like. I never drank over a pint of whiskey in all my life, nor have I ever seen a still in my life. Mr. Huff conducted his business on the second floor of the building while he was there.

I could look in either the front door or back door of the Bachmann Building on the first floor and see clear through. There was a glass partition at the rear but you could see through it. The frame work of the partition came up about two feet and a half. This space was an office before we took over the building. When we took the building we ripened bananas there in the produce business.

At this point, the plaintiff rested her case.

Thereupon the defendant, to further maintain the issues upon its part, introduced the following testimony in surrebuttal:

SAMUEL MORRIS

Direct examination:

Is the same Professor of the Department of Chemistry of West Virginia University who has heretofore testified in [fol. 140] this case. I use jet burners with natural gas as fuel in my chemical laboratory, and also use natural gas in my home.

Thereupon, the following testimony of this witness was taken upon direct examination out of the hearing of the jury, objection thereto having been made by counsel for the plaintiff:

"Q. I will ask you to state, from your experience and investigation and study as to the comparative use of natural gas on the one hand, and gasoline on the other hand for heating these jets or burners or hot plates, particularly with reference to what precautions should be taken.

A. In heating with natural gas the chief danger lies in getting a mixture of gas and air, and in the case of using gasoline there is the same danger, of course, with gasoline, but there is the added danger of keeping the supply to be used.

Now, the Bureau of Mines in its pamphlet that I have referred to on hazards in handling gasoline, by George A. Burrough, says that the supply of gasoline to be used in a burner in a building or to be used in a building in any way, especially in use of a burner, should be kept outside of the building, a safe distance from the building and buried underground, and that the gasoline should be pumped—the supply should be pumped into the building through pipes that drain backward to the container. That is, if you pump in for a small supply at the time, if a supply is to be needed, that should be pumped in and not be carried in vessels. And if it is to be carried in vessels, they should be closed vessels, and he says to use as small an amount as possible.

Q. Now, Professor, in your examination the other day, you testified that you had seen the gasoline compressor tanks which were taken from the Bachmann building, or which were pointed out to you as being that?

A. I did.

Q. I believe at that time, Professor, you explained to the jury the method in which the gasoline was gotten from such tanks to the burner. What can you say with respect to the proper or safe location of such a gasoline compressor tank that is to be used to heat open jets or burners?

A. To such a container is attached the statement that this [fol. 141] container should be placed outside the building in which the gasoline is burned.

Q. Just state the reasen for that, if you know. What is the reason for not having the gasoline compressor tank right within a few feet of the open burner?

A. There are several. In the first place, if in filling the containers there is any gasoline spilled that mixes with the air—vitalizes and mixes with the air and forms a dangerous combustible mixture which may float along the floor for several feet, and become ignited.

Q. Do you mean when filling the burner?

A. When filling the tank, I mean. If any gasoline is spilled or any should leak out, there is danger of ignition from an open burner.

Q. From your observation and examination of these gasoline compressor tanks which were pointed out to you as having been the ones involved in this case, how could they be filled? What manner was there or apparatus was there for filling the tanks?

A. The only way of filling is to take off the cap and pour the liquor in.

Q. The cap on top of the tank?

A. Yes."

Thereupon the defendant moved that each of the foregoing questions and answers taken in the absence of the jury be read to the jury, which motion the plaintiff resisted; the court overruled the said motion and refused to permit the said questions and answers to be read to the jury, or to permit the jury to hear the same, to which ruling of the court as to each of said questions and answers the defendant duly excepted. And in excluding said evidence, the Court said:

"The Court: Gentlemen, the first specification of defense here sets up certain conditions—"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring while the hazard is increased by any means within the control or knowledge of the assured.

Mr. Guiher's question has been practically passed upon by the Supreme Court of Montana in June of this year, in the case of Fayle vs. Camden Fire Insurance Association, 278 Pac. 509. Also by the Supreme Court of Kentucky in Obermeyer vs. Phoenix Insurance Company, 290 S. W. 500, [fol. 142] and Colker vs. Connecticut Fire Insurance Company, 290 S. W. 1073, and by the Supreme Court of Washington, in Ragley vs. Northwestern National Insurance Company, 276 Pac. 537. Each of these cases is stronger than the state of facts presented here. * * *

Gentlemen, I am constrained to sustain*ed* the objection.

Exception by defendant."

RUSSELL L. FURBEE

Direct examination:

Is a practicing attorney residing at Fairmont, West Virginia, and is one of counsel for the defendant St. Paul Fire & Marine Insurance Company in this case. I became acquainted with Ashby Jackson, who testified in this case for the plaintiff, about six years ago, and about ten days after the fire at the Bachmann Building I had a talk with Ashby Jackson, at the Federal Prohibition office in the City of Wheeling, regarding what he had found or observed at the scene of the fire. At that time, I was Assistant United States Attorney for the Northern District of West Virginia, and I was helping the Government make an investigation as to who owned the stills and who was responsible for the apparatus found in the building after the fire which was designed and intended to be used in the manufacture of liquor.

Thereupon, the following question was asked the witness and answer returned thereto:

"Q. At the time of your conversation with Mr. Jackson, did he make any statement to you, or in your hearing with respect to approximately twenty-five five-gallon cans of gasoline which had been alleged to be on the first floor in the rear of the Bachmann building and found there immediately after the fire?

A. Yes, at that time I was interrogating him, and I asked him—I want to preface by stating that he had previously told me that he and Elmer Faddis had been the first two into the first floor of 1312 Main Street when he responded to the [fol. 143] alarm, that Faddis carried the hose in, and he recited exactly, as he said, on the witness-stand in this suit, that when he went in, Faddis preceded him in, what they discovered, and somebody yelled to them they had better get out because the floor was going to fall, and he grabbed hold of the hose, and Faddis had hold of the other end, and they started out, and as they started out with it—this was his statement to me—in December or early January, 1926—that the hose fell over a lot of cans along the side of the partition, and that he did not stop to examine any of the cans, that he was busy getting the hose out, and that he never had examined the contents of the cans, and he did not after the fire examine the contents of the cans, and could not at that time tell me what the cans had contained."

I was making this examination as an official representative of the Government of the United States. Ordinarily witnesses for such an investigation are sent for through the office of the United States Marshal or other Federal officers, but in this instance the summoning of Ashby Jackson and Elmer Faddis was done through the Prohibition officers. Other Government officers were there and our questioning was done for the purpose of securing evidence for use by the Government.

At this point the defendant rested its case.

MOTIONS TO EXCLUDE TESTIMONY, ETC.

Thereupon the defendant moved the court to exclude, and to direct the jury to disregard, all of the testimony of the plaintiff's witnesses A. S. Whitely, Edward Bachmann, William Gutman, Ira P. Huff, Carl G. Bachmann and

Charles F. Bachmann as heretofore shown in this narrative, in so far and in so far only as the testimony of each of said witnesses related to the business being conducted in the Bachmann Building by said Huff prior to the fire and the various materials described as having been used in said business, as well as what the representatives of the Insurance Companies were shown on their visits there regarding said materials and ingredients. This motion to exclude was resisted by the plaintiff, and the court overruled said motion and refused to strike out said testimony or any part thereof, or to instruct the jury to disregard the same, to [fol. 144] which action and ruling of the court as to each and every part of said testimony, the defendant duly excepted.

Thereupon the plaintiff moved the court to exclude all of the testimony of the defendant's witness Mrs. Ellen Weidner, which motion was overruled by the court, and to said ruling the plaintiff duly excepted.

Thereupon the plaintiff withdrew her objections heretofore made to the testimony of the witness Elmer Faddis. The plaintiff also withdrew her objections to and motions to exclude the testimony of the defendant's witnesses August Forsch and Mrs. August Forsch.

And the court now certifies that the foregoing was all of the evidence and testimony adduced at the trial of this case and all of the evidence heard by the jury.

The plaintiff and the defendant having now rested their respective cases, the defendant moved the court to exclude all of the plaintiff's testimony and to direct a verdict for the defendant. Likewise the plaintiff moved the court to exclude all of the defendant's evidence and to direct a verdict in favor of the plaintiff. Thereupon, while the court was considering these two motions but before any decision had been reached or announced by the court, the defendant asked leave of the court to withdraw its said motion for a directed verdict. After having taken the matter under advisement, the court thereupon permitted the defendant to withdraw its said motion for a directed verdict, and the same was withdrawn, to which action and ruling of the court in permitting defendant's said motion to be withdrawn the plaintiff duly excepted.

Thereupon the court overruled the motion made by the plaintiff to exclude the defendant's evidence and to direct

a verdict in favor of the plaintiff, to which action and ruling of the court the plaintiff duly excepted.

Thereupon the plaintiff tendered to the court and requested the court to incorporate in its charge to the jury the following several instructions in writing, to-wit:

PLAINTIFF'S REQUESTED INSTRUCTIONS

"Plaintiff's Instructions No. A

With respect to the requirement that the defendant must prove its specifications of defense by a preponderance of the evidence, the court charges the jury that you are to consider all of the testimony and it is the defendant's duty to [fol. 145] establish its case by a preponderance of the evidence, and the jury will return a verdict for the plaintiff if the evidence is clearly balanced, or if it preponderates for the plaintiff or if you are in doubt as to the preponderance. The burden of proof is not on the plaintiff to prove that the defendant's specifications of defense are not true but it is upon the defendant, the Insurance Company to prove that its specifications of defense are true, and if the preponderance does not show the truth of the matters specified in the said specifications of defense, the verdict of the jury should be for the plaintiff."

"Plaintiff's Instruction No. 1

The jury are further charged by the Court that the defendant has set out the grounds of defense upon which it depends to defeat liability in this action and these grounds of defense are that some time prior to the said fire, to-wit, upon the 1st day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent, or agents, to one, Bill Varisca, for the term of eighteen months; that at the time of the fire and prior thereto, the said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquor; that the operation of said stills upon said premises was in express violation of the Prohibition and other laws of the United States as well as of the State of West Virginia, and

thereby subjected the said Bill Varisca and his associates in case of discovery to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the said parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner and for the most part during the nighttime with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning thereof and for the establishment of the same could not and would not be used by the said occupants of the building and that in many other ways said unlawful, illegal and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained [fol. 146] of and that all of said facts were then and there known to the said plaintiff and her agent, the said Charles F. Bachmann. You are charged by the Court that the burden of proving said facts rests upon the defendant Companies and that such proof must be made by a preponderance of the evidence and that not only must the said defendant Insurance Company prove said facts by a preponderance of the evidence but it must also prove by a preponderance of the evidence that the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, actually had knowledge thereof and unless the said Insurance Company has so proven said facts and proven such knowledge, it has not established the said assignment of its defense.

You are further charged by the Court that as a matter of defense to its liability in this case, the said Insurance Company has also assigned the grounds that the said moonshine still or stills were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible and explosive substances used in and about their operation; that especially the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom, and that the fire hazard to the insured building was greatly increased thereby and in fact caused or contributed to the fire herein complained of, all of which facts must be proven by the defendant by a preponderance of the evidence, that is, that the still or stills if they were then in the building were in themselves highly dangerous instrumentalities; that on account of the inflammable, combustible and explosive substances used in and about their operation,

relating to the process of manufacturing automobile oils conducted by him in the Bachmann Building, some time prior to the fire and the materials used there, including the testimony relating to the visit of the insurance representatives, which motion was overruled by the Court and to the action and ruling of the Court the defendant duly excepted as to each part of said testimony.

Redirect examination:

The insurance suits which I have pending are none of them againts the defendant St. Paul Fire & Marine Insurance Company. When I was conducting the business in the Bachmann Building the gasoline was used as a driver in the penetrating oil, to cut rust. The building in Wheeling in which I had my fire was owned by Charles F. Bachmann's [fol. 135] daughter and not by Bachmann himself. Since I was dealing with Mr. Bachmann I just referred to him as owner of the building.

EMIL STUMPP

Direct examination:

Is a butcher with place of business located on Market Street, Wheeling. I was at the fire at the Bachmann Building and on the following day. On the morning following the fire about half past 7:00, I went to the first floor of the Bachmann Building, a distance of about fifteen or twenty feet across the alley from where my place of business was. I did not see or notice any gasoline or gasoline cans on the floor that morning when I went there. The first floor had a metal ceiling and it had caved in. I did not go on the other floors of the building.

CHARLES C. COLEMAN

Direct examination:

Is a salesman for the Palace Furniture Company which occupied the building two doors north of the Bachmann Building on Main Street. I went to the rear of the Bachmann Building on the morning following the fire and went

inside as far as the place where the ceiling had caved down and looked around to see if I could see what caused the fire. I was in a position to see what was on the first floor. I did not see any gasoline or gasoline cans and I was in a position to see them if they had been there. The first floor had a metal ceiling. The ceiling near the rear of the building seemed to be intact but towards the center it had caved in.

CARL G. BACHMANN

Direct examination:

Is one of counsel for the plaintiff in this case and is a son of the plaintiff and Charles F. Bachmann. Has been a [fol. 136] member of Congress for the last five years. Prior to Thanksgiving Day, 1925, my father had his office in the building on Main Street. I left for Washington on Thanksgiving Day and my office was then in rooms 600 and 601, in the Riley Law Building. My father, Charles F. Bachmann, took possession of my office when I left and paid the rent of that office until I returned about July, 1926.

While Huff was in the Main Street building making the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business.

I am very well acquainted with Alonzo Prince, one of the witnesses who has testified here for the defendant, and I have had two conversations with him regarding the five gallon can of gasoline said to have been found by him on the third floor. The first conversation was in the Marshall's office in the Federal Building in Wheeling on last

that the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom which assignment of grounds of defense requires the Insurance Company to prove by a pre-onderance of the evidence that the stills at that time were actually in operation; that the defendant is further required to prove by a preponderance of the evidence that not only the stills themselves were actually in operation but that such operation was carried on in such a manner that the fire hazard to the building was greatly increased and the defendant is also required to prove by a preponderance of the evidence that such operation in fact caused or contributed to the fire complained of and in addition the defendant company is required to prove [fol. 147] by a preponderance of the evidence all these facts but the defendant Insurance Company is also required to prove by a preponderance of the evidence that all of said facts were within the control or knowledge of the said Sophia C. Bachmann and/or her agent, Charles F. Bachmann.

The said defendant has also assigned as grounds of defense that in connection with the operation of said moonshine still or stills, the said Bill Varisca and his associates necessarily used large quantities of gasoline, mash and other highly combustible, inflammable and explosive substances as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the said insured building and directly caused or contributed to the fire of which the plaintiff complains in this action. With respect to these last assignments of defense, the Court charges you that the defendant Insurance Company must prove the same by a preponderance of the evidence and even though it has proven such facts by a preponderance of the evidence, still the defendant Company would be liable herein unless it has also proven by a preponderance of the evidence that the said plaintiff, Sophia C. Bachmann, or Charles F. Bachmann, her agent, had control or knowledge of said facts at and before the time of the fire."

"Plaintiff's Instruction No. 2

The jury are further charged by the Court that under the second Assignment of Grounds of Defense, the said defendant Insurance Company must prove by a preponderance of the evidence that at the time of the fire complained of and

prior thereto large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises and that such keeping, using and allowing of gasoline was well known to the plaintiff, Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, and unless the said defendant has proven by a preponderance of the evidence the presence of gasoline, explosives, mash and other highly combustible and inflammable substances upon said premises at and before the time of the fire and has also proven by a preponderance of the evidence that such keeping, using and allowing was well known to the plaintiff, [fol. 148] Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, such keeping, using and allowing of gasoline on said premises constitutes no defense for the defendant Company in this action."

"Plaintiff's Instruction No. 3

The jury are charged by the Court that the fact alone that Bill Varisca either alone or with any associates may have operated liquor stills upon the insured premises and that the fire which destroyed said premises was caused by or through the operation of said stills does not relieve the defendant insurance company from liability under its policy sued upon in this case but in order that the said insurance company may be so relieved it is incumbent upon said insurance company to prove to your satisfaction by a preponderance of the evidence that the said plaintiff, Sophia C. Bachmann, or her agent, Charles F. Bachmann, had control or knowledge of the said liquor still operations and if the said plaintiff and/or her said agent did not have such control or knowledge then notwithstanding the fact that said stills were so operated your verdict should be for the plaintiff."

"Plaintiff's Instruction No. 3-A

The Court further charges the jury that the words "within the control or knowledge of the insured" as used in these instructions means that the insured must have actual knowledge as the word "control" involves reasonably and fairly some knowledge of the hazardous use of the premises and it is not enough to show that the insured, the

plaintiff in this case, had the means of knowledge, but it is incumbent upon the defendant in this case to prove by a preponderance of the evidence that the insured, the plaintiff in this case or her agent, actually had knowledge of the facts relied on as a defense in this action."

"Plaintiff's Instruction No. 4

The jury are charged by the Court that even though you may believe from the evidence that at and prior to the time of the fire complained of quantities of gasoline were being [fol. 149] kept or used upon the premises described in the policies of insurance either for the operation of stills or for any other purpose and even though you may believe that at the time — the fire in question, stills were actually being operated upon the premises destroyed by fire, yet the Court charges you that such keeping and using of gasoline and such operation of stills — that if neither the said plaintiff, Sophia C. Bachmann, nor her agent, the said Charles F. Bachmann, had any knowledge or control of such keeping and using of gasoline or such operation of stills, such keeping, using and operation will not invalidate the insurance policy issued by the defendant and sued on in this case. That is to say that unless the plaintiff, Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation under such circumstances constitute no defense for the defendant company."

"Plaintiff's Instruction No. 5

The Court instructs the Jury that the policy of insurance described in the evidence in this case was duly and regularly issued to Sophia C. Bachmann and that the premiums were duly and regularly paid to the defendant insurance company by the said Sophia C. Bachmann and that the property was afterward destroyed by fire as described in the evidence and the Court further instructs you that if you believe from the preponderance of all the evidence in this case that the plaintiff has fairly and reasonably complied with all the terms of the policy of insurance and has not been guilty of a breach of any of the terms of said policy of insurance then you are instructed as a matter of law that the plaintiff

is entitled to recover in this case and your verdict should be for the plaintiff."

"Plaintiff's Instruction No. 6

The jury are charged by the Court that the evidence and testimony in this case now before you gentlemen of the jury discloses and establishes that the Defendant Company issued and delivered to the plaintiff, Sophia C. Bachmann, [fol. 150] the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefor; that the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date, the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss not less than $3,784.49 the amount of said policy; that thereafter duly and seasonably the plaintiff made out and filed with the defendant the required Proofs of Loss. Under these circumstances, you are charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased and/or that quantities of gasoline were kept and used upon said premises, your verdict shall be for the plaintiff."

"Plaintiff's Instruction No. 7

The Court further charges you that while as a matter of fact the insurance policies in question provide that if the hazard insured against by the said insurance policy is increased by any means within the control or knowledge of the insured or if gasoline is kept, used or allowed upon the insured premises then in either event, the said defendant Company shall not be liable, yet you are also charged by the Court that before the defendant Company can escape liability on account of such increased hazard or on account of such keeping, using and allowing of gasoline on the insured premises, such increase of hazard and such keeping, using or allowing of gasoline on said premises must be within the control or within the knowledge of the plaintiff, Sophia C. Bachmann or her agent, Charles F. Bachmann."

"Plaintiff's Instruction No. 8

The jury are charged by the Court that the evidence and testimony in this case now before you Gentlemen of the jury discloses and establishes that the defendant company issued and delivered to the plaintiff, Sophia C. Bachmann, the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefor; that [fol. 151] the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss of $3,784.49, the amount due on said policy; that thereafter duly and seasonably the plaintiff made out and filed with the defendant the required Proofs of Loss. You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline."

"Plaintiff's Instruction No. 9

The Court instructs the jury that the evidence is uncontradicted that the defendant Insurance Company, through its agent, Alexander Campbell, knew that gasoline was kept on the premises mentioned and described in the insurance policy in this case. The Court, therefore, instructs you that for this reason the defendant Insurance Company waived the provision in the policy prohibiting the keeping, using and allowing gasoline on the premises and is estopped to set this provision up as a defense. The evidence is equally uncontradicted that the Insurance Company by executing and affixing to the policy the rider described in the evidence permitting the plaintiff to bottle automobile oils described in the insurance policy in this case and that such automobile oils contained gasoline and

the Court, therefore, instructs you as a matter of law that the defendant Insurance Company thereby waived the provision in the policy prohibiting the keeping, using or allowing gasoline on the premises in question and the defendant is, therefore, estopped to set up a violation of this provision as a defense to this action. The Court, there-
[fol. 152] fore, instructs you that there is but one issue in this case and that is whether or not the plaintiff, or her agents, actually had knowledge that the risk insured against was increased by the maintenance and operation of a liquor still on the premises described in the insurance policy in this case. Therefore, in this case unless you believe from a preponderance of the evidence that a liquor still was maintained and operated on the premises described in the evidence and further believe that the def-ndant insuranc- company, by a preponderance of the evidence has established that the plaintiff, or her agent, had actual knowledge of the maintenance and operation of the liquor still in question, then you are instructed as a matter of law that your verdict cannot be for the defendant but that your finding must be for the plaintiff, Sophia C. Bachmann."

"Plaintiff's Instruction No. 10

To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca and/or his associates and if on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the plaintiff, Sophia C. Bachmann."

And to the giving of the aforesaid instructions tendered by the plaintiff, and each of them, except plaintiff's said instruction No. 5, the defendant duly objected.

And thereupon the defendant tendered to the court and requested the court to incorporate in its charge to the jury the following several instructions in writing to-wit:

[fol. 153] DEFENDANT'S REQUESTED INSTRUCTIONS

"Defendant's Instruction No. 1

The court charges the jury that if you believe from the evidence in this case that, at and prior to the time of the fire complained of, substantial quantities of gasoline were being kept, used or allowed upon the premises described in the policy either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question, and that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

"Defendant's Instruction No. 1-A

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire complained of, gasoline was being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant, either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question, and that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

"Defendant's Instruction No. 1-B

The court charges the jury that if you believe from the evidence in this case that, at and prior to the time of the

fire complained of herein, quantities of gasoline were being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant or of the said plaintiff, either for the purpose of operating moonshine stills or for any other purpose [fol. 154] not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe from the evidence that such gasoline did not in any way cause or contribute to the fire in question."

"Defendant's Instruction No. 1-C

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire complained of, quantities of gasoline were being kept, used or allowed upon the premises described in the policy, by the tenant Bill Varisca or by some other person or persons by and with the knowledge and consent of said tenant, either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy sued upon, then you must find for the defendant, even though you may further believe that neither the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence of such gasoline upon the insured premises."

(NOTE.—The foregoing instructions Nos. 1, 1-A, 1-B and 1-C were tendered to the court as a series; that is, the court was requested in the first instance to give defendant's said instruction No. 1, and in the event of its refusal, to give said instruction No. 1-A, and in the event of refusal to give No. 1 and No. 1-A, then to give No. 1-B, and if Nos. 1, 1-A and No. 1-B were refused, then to give No. 1-C.)

"Defendant's Instruction No. 2.

The court charges the jury that under the circumstances as shown by the evidence in this case, if you believe that the plaintiff's husband, Charles F. Bachmann, had any knowledge or notice of the presence, use or operation in the insured building, of any moonshine still or stills, or of the presence or use therein of any of the articles pro-

hibited by the plaintiff's policy, then such knowledge or notice can and should be imputed to the plaintiff Sophia C. Bachmann as the owner of said building.

[fol. 155] "Defendant's Instruction No. 3

The court charges the jury that if gasoline was being kept, used or allowed upon the premises described in the policy at the time of the fire, in violation of the terms of the policy, it is not incumbent upon the defendant to prove, in order to establish a forfeiture of the policy, that such gasoline in any way caused or contributed to the fire in question."

"Defendant's Instruction No. 4

The court charges the jury that if you believe from the evidence that gasoline was being kept, used or allowed upon the premises described in said policy at the time of the fire, in violation of the terms of the policy, it is not incumbent upon the defendant in this case, in order to show a forfeiture of said policy, to prove that either the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann had any actual knowledge or notice of the presence or use of such gasoline in the insured building."

"Defendant's Instruction No. 5

The court charges the jury that if you believe from the evidence that the fire hazard to said property was being increased as alleged in defendant's specifications of defence, at and prior to the time of the fire complained of, by any means within the knowledge or control of the plaintiff Sophia C. Bachmann or her husband Charles F. Bachmann, including any dangerous use or occupation of said building which in your judgment increased the *the* fire hazard in violation of the terms of plaintiff's policy, and that such increase in hazard, if any, caused or contributed to the fire and loss which occurred on the 27th day of December, 1925, then you must find for the defendant."

"Defendant's Instruction No. 6

The court charges the jury that if you believe from the evidence that, at and prior to the time of the fire, one or more moonshine stills were being kept, operated or used upon the insured premises; that such presence, use or

[fol. 156] operation of such stills increased the fire hazard to plaintiff's building, and whether by explosion or otherwise, caused or contributed to the fire in question; and that the plaintiff or her husband, Charles F. Bachmann, prior to and at the time of the fire, knew of the presence or use of such stills upon the premises, or had reasonable cause to believe or know that such apparatus was being there so used or operated, then you must find for the defendant, even though you may further believe that neither the plaintiff nor her said husband had any interest in said stills, or had in any way whatever participated in the purchase, use or operation thereof."

"Defendant's Instruction No. 7

The court charges the jury that this is not a criminal case, and that it is therefore not incumbent upon the Insurance Company to prove, beyond a reasonable doubt, that the plaintiff or her husband, Charles F. Bachmann had knowledge or notice of any condition prevailing in the insured building, as alleged in defendant's specifications of defense at and prior to the time of the fire, which may have increased the fire hazard to the insured premises. It is only incumbent upon the Insurance Company to prove such knowledge or notice by a preponderance of the evidence, and in determining this question of fact, you have the right to consider all of the circumstances as shown by the evidence."

And to each of the said instructions tendered by the defendant, the plaintiff duly objected, except as to said defendant's instruction No. 2.

After having taken time to consider the several instructions so offered by the plaintiff and the defendant as aforesaid, and after having heard the argument of counsel thereon, the court announced that it would incorporate in its charge to the jury all of the plaintiff's instructions aforesaid, save and except plaintiff's instructions Nos. 3-A and 9, which would be refused, and that the court would refuse to give to the jury all of defendant's said instructions, save and except defendant's instructions Nos. 2, 5 and 7, which would be given. Thereupon, the plaintiff duly

excepted to the overruling by the court of its objections to [fol. 157] defendant's instructions Nos. 5 and 7, as aforesaid (no objection having been made to defendant's instruction No. 2), and the defendant likewise then and there duly excepted to the action of the court in overruling its several objections to the giving of the plaintiff's instructions and each of them (except as to the two instructions of the plaintiff refused as aforesaid, and except as to plaintiff's instruction No. 5 to which there was no objection made); and the defendant likewise then and there excepted to the action of the court in sustaining the objections of the plaintiff to the giving of defendant's said instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them.

And having thus considered and passed upon the several instructions thus offered by the plaintiff and the defendant, the court thereupon charged the jury in the words and figures following (the portions of the charge below covering the several instructions given on behalf of the plaintiff and defendant, as aforesaid, are here identified, so as to indicate clearly the exceptions taken thereto by the parties as shown below):

CHARGE TO JURY

"GENTLEMEN OF THE JURY: You are to be congratulated that we have now come to the end of what has been a long and somewhat tedious trial. Cases of this nature are necessarily long, but I want to compliment this jury upon the careful, painstaking way in which you have listened to four solid days of the testimony, sitting from early in the morning until six o'clock and after six o'clock in the evening. The Court usually tries to go over the entire evidence of a case and sum it up for the jury, but after seeing the way you have listened to this evidence, and to the able arguments of two hours, in which every feature and phase of the evidence was called to your attention in detail, I do not feel called upon to go over this evidence, but shall satisfy myself by giving you the principles of law that shall govern you when you return to your room to consider of your verdict. And the law, as given you by the Court, and the evidence as you heard and remember it, shall be the basis of your verdict. In other words, lay the evidence squarely down on the table and use the law, as given you by the Court, as the

straight edge by which it shall be measured, and by a combination of the law, given you by the Court, and the evi-
[fol. 158] dence as you heard it and remembered it, bring in your verdict.

Speaking of remembering the evidence, I call you- attention to the fact that you gentlemen are the sole judges of the weight and credibility of the testimoney in this case, and in weighing the testimony, the evidence of all witnesses is to be weighed and considered under the same rule, and in considering the evidence of all witnesses you may take into consideration their demeanor on the stand and the reasonableness or unreasonableness of their testimony, and, in connection with all the surrounding conditions, if you believe any of the persons testifying in this case have testified falsely you may believe such part of such testimony as you believe to be true, and reject such part as you believe to be false. For it is a matter for you to determine from all the testimony taken and the demeanor of the witnesses whether witnesses have testified truthfully, and what ones, if any, have testified falsely.

District Clerk's Note

Plaintiff's Instruction No. A (page 144 of this record) was read to the jury.

Plaintiff's Instruction No. 1 (page 145 of this record) was read to the jury.

Plaintiff's Instruction No. 2 (page 147 of this record) was read to the jury.

Plaintiff's Instruction No. 3 (page 148 of this record) was read to the jury.

Plaintiff's Instruction No. 4 (page 148 of this record) was read to the jury.

Plaintiff's Instruction No. 5 (page 149 of this record) was read to the jury.

Plaintiff's Instruction No. 6 (page 149 of this record) was read to the jury.

Plaintiff's Instruction No. 7 (page 150 of this record) was read to the jury.

[fol. 159] Plaintiff's Instruction No. 8 (page 150 of this record) was read to the jury.

"On Behalf of the Defendant

Defendant's Instruction No. 2 (page 154 of this record) was read to the jury.

Defendant's Instruction No. 5 (page 155 of this record) was read to the jury.

Defendant's Instruction No. 7 (page 156 of this record) was read to the jury.

"In other words, gentlemen of the jury—Plaintiff's Instruction No. 10 (page 152 of this record) was read to the jury.

Now, gentlemen of the jury, it is agreed by and between counsel, as there are some calculations as to the amount due on this policy on account of a small deduction, you may bring in a verdict for the plaintiff saying, "We, the jury, find for the plaintiff and assess the damages at $—," or you may bring in a verdict, "We, the jury, find for the defendant". In case the finding should be for the plaintiff, counsel will agree as to the amount."

PLAINTIFF'S EXCEPTIONS TO CHARGE

Thereupon the plaintiff duly excepted upon the record to the foregoing charge of the court in the following particulars, to-wit:

1. To that part of the charge incorporating therein defendant's said Instruction No. 5, as aforesaid, in its entirety, and particularly on the grounds that this instruction allows the jury to speculate on what is an increase of fire hazard and also that the fire hazard may have been increased prior to the fire and was not in existence at the time of the fire.

2. To that portion of the court's charge incorporating defendant's said Instruction No. 7 in its entirety, and also on the ground that the suggestion is made therein that a criminal proceeding has been or may be instituted against the plaintiff.

[fol. 160] 3. To the refusal of the court to incorporate in its said charge to the jury plaintiff's said Instructions Nos. 3-A and 9, and each of them.

Thereupon, the defendant duly excepted upon the record to the foregoing charge of the court to the jury in the following particulars thereof, and each of them, to-wit:

1. To the action of the court in incorporating in said charge plaintiff's Instruction No. A in its entirety.

2. To the incorporation by the court in its said charge of plaintiff's said Instruction No. 1. The defendant excepted to the giving of said instruction in its entirety, and also to the parts thereof requiring the defendant to prove that the stills in the Bachmann Building were actually in operation, and also the part thereof requiring the defendant to show that the presence or operation in said building of gasoline or moonshine stills was within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann.

3. To that portion of the charge incorporating plaintiff's said Instruction No. 2, in charging the jury that the keeping, using and allowing of gasoline on the premises must have been well known to the plaintiff or her agent, Charles F. Bachman. At the bottom of said instruction the defendant made the following notation: "Objected to by defendant and exception by defendant to giving. J. M. G."

4. To that portion of the charge incorporating plaintiff's Instruction No. 3 which required the defendant to prove that any moonshine stills upon the premises must have been within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann. At the bottom of said instruction, the defendant made the following notation: "Objected to by defendant and exception by defendant to giving. J. M. G."

5. To that portion of the court's charge incorporating plaintiff's Instruction No. 4 in its entirety, and especially as to that part thereof requiring the defendant to prove [fol. 161] that the plaintiff or her agent, Charles F. Bachmann, had control or knowledge of the keeping or using of gasoline or moonshine stills upon the insured premises.

6. To that portion of the court's charge incorporating plaintiff's said Instruction No. 6 in its entirety, and particularly as to that portion of said instruction which told

the jury that "the said policy was in full force and effect upon December 27, 1925", and the portion thereof requiring the defendant to prove by preponderance of the evidence that any gasoline kept or used upon the premises was within the control or knowledge of the plaintiff.

7. That portion of the court's charge incorporating plaintiff's said Instruction No. 7 in its entirety, and particularly as to that part thereof requiring the defendant to prove that the keeping, using or allowing of gasoline on the insured premises was within the control or knowledge of the plaintiff or her agent, Charles F. Bachmann.

8. To that portion of the Court's charge incorporating plaintiff's said Instruction No. 8, said instruction being objected to in its entirety, and also because it charged the jury that "the said policy was in full force and effect upon December 27, 1925", because it required the defendant to prove control or knowledge on the part of the plaintiff as to any moonshine stills or gasoline upon the insured premises, and because it charged the jury that the defendant was estopped from avoiding liability on the policy because quantities of gasoline had been kept and used upon the premises following the issuance of the rider on the policy permitting the bottling of automobile oils. At the bottom of this instruction, the defendant made the following notation:

"Objection by defendant, and exception by defendant to giving, both as a whole, and as to part charging that "the said policy was in full force and effect on December 27, 1925", and that part of charge as to estoppel of defendant on account of rider on policy. J. M. G."

9. To that portion of the Court's charge incorporating said plaintiff's Instruction No. 10, said instruction being [fol. 162] excepted to in its entirety and in so far as it charges that the defendant must prove by a preponderance of the evidence that either the plaintiff or her agent, Charles F. Bachmann, had knowledge of the matters and things alleged to have been done and performed upon the insured premises by the tenant Bill Varisca or his associates. At the bottom of this instruction, defendant made the following notation: "Objected to by defendant and exception by defendant to giving."

10. To the refusal and failure of the Court to embody in its said charge to the jury defendant's said Instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them.

VERDICT

And thereupon the jury, having heard the argument of counsel and the foregoing charge of the court, retired to their room to consider of their verdict, and after some time returned into Court, and upon their oaths did say:

"We, the jury, find for the plaintiff and assess her damages at $4,591.84.

A. D. Peake, Foreman."

MOTION FOR NEW TRIAL

Thereupon the defendant moved the Court to set aside the said verdict of the jury, and to grant it a new trial herein, which motion, having been considered by the court, was overruled, and to said action and ruling of the court, in refusing to set aside the verdict of said jury and to grant the defendant a new trial herein, and in overruling its said motion for a new trial, the defendant then and there duly excepted.

Thereupon the court entered judgment in favor of said plaintiff and against said defendant upon the said verdict of the jury, to which action of the court in rendering judgment upon said verdict the defendant then and there duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

And the defendant having thus duly preserved its exceptions in the matters aforesaid, prayed that this, its bill of exceptions containing a narrative of the evidence and testimony and the charge of the Court, might be settled, signed, sealed and saved unto it, and made a part of the record herein, which is now accordingly done on this the [fol. 163] 3rd day of February, 1930, and within ninety

days from the date on which the said final judgment herein was rendered.

W. E. Baker, Judge of the United States District Court for the Northern District of West Virginia. (Seal.)

O. K.—Jany. 30, 1930.

J. Bernard Handlan, of Counsel for Sophia C. Bachmann.

O. K.

Steptoe & Johnson, James M. Guiher, Counsel for St. Paul Fire & Marine Ins. Co.

IN UNITED STATES DISTRICT COURT

ORDER FILING BILL OF EXCEPTIONS—Entered February 3, 1930

This day came the said defendant St. Paul Fire & Marine Insurance Company, a corporation, by Steptoe & Johnson, James M. Guiher and Russell L. Furbee, its counsel, and came also the said plaintiff by Handlan, Garden & Matthews and Carl G. Bachmann, her attorneys; thereupon the said defendant tendered to the court and asked leave to file as a part of the record herein the complete transcript of the evidence taken at the trial of this action, and the exhibits therewith, as prepared by Mr. L. E. Schrader, the stenographer sworn for the purpose, which said transcript is marked for identification herein as "Testimony". And the said transcript of the evidence having been seen and inspected by the court, it is ordered that the same be and it is hereby filed as a part of the record in this cause.

Thereupon the defendant also tendered to the court its bill of exceptions containing a narrative of the evidence, marked for identification as "Defendant's Bill of Exceptions", as well as its petition for an appeal and supersedeas, its written assignments of error, and its notice in writing [fol. 164] to the said plaintiff that said bill of exceptions would this day be presented to the court for settlement, and that an appeal from the final judgment herein would this day be applied for, which said three papers are marked for

identification herein respectively as "Petition for Appeal", "Assignments of Error" and "Notice for Settlement of Bill of Exceptions and Notice of Appeal". And the said three papers, and each of them, having been seen and inspected by the court, and it further appearing that the said plaintiff accepted service of the said notice under date of January 20, 1930, it is therefore ordered that the said three papers, and each of them, be and they are hereby filed as a part of the record in this cause.

Enter- this the 3rd day of February, 1930.

W. E. Baker, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER—ORIGINAL EXHIBITS TO C. C. A.—Entered Feb. 26, 1930

It is ordered that the Clerk shall omit from the transcript of record upon appeal in this case copies of "Plaintiff- Exhibit No. 7—Diagram", "Defendant's Exhibit No. 2—Photo", and "Defendant's Exhibit No. 3—Photo", exhibited and filed upon the trial of this case, and made a part of the record upon appeal by the pr-ecipe for the transcript of record, but in lieu thereof, said Clerk shall certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit the originals thereof, the same to be used upon oral argument of this case before said Circuit Court of Appeals, for the inspection of, and for such other purposes as may be required by said Circuit Court of Appeals, and in due and proper time that the said original papers be by the Clerk of said Circuit Court of Appeals returned to the Clerk of this Court.

Enter February 26, 1930.

W. E. Baker, Judge.

[fol. 165] ASSIGNMENT OF ERRORS—Filed February 3, 1930

Comes now the appellant St. Paul Fire & Marine Insurance Company, a corporation (defendant below), and in support of its petition for an appeal and supersedeas from the final judgment rendered against it in the above

action by the United States District Court for the Northern District of West Virginia, at Wheeling, on the 13th day of November 1929 assigns the following errors in the said judgment:

1. The trial court erred in overruling the defendant's motion to set aside the verdict of the jury and to grant defendant a new trial herein.

2. The trial court erred in entering judgment upon the verdict.

3. The verdict and judgment complained of are contrary to the law and the evidence.

4. The trial court erred in embodying in its charge to the jury, at the request of the plaintiff and over the objections of the defendant, plaintiff's instructions Nos. A, 1, 2, 3, 4, 6, 7, 8 and 10, and each of them, the portion of the court's charge including said instructions being in the words and figures following, to-wit:

Note by District Clerk

For Plaintiff's Instructions No. A, 1, 2, 3, 4, see page 144, et seq. of this record.

And for Plaintiff's Instructions No. 6, 7 and 8, see page 149, et seq. of this record.

And for Plaintiff's Instruction No. 10, see page 152 of this transcript of record.

To the said portions of the court's charge to the jury quoted above the defendant and appellant duly excepted upon the record as follows:

Note by District Clerk

For Defendant's exception upon the record, see page 160, et seq. of this record.

[fol. 166] 5. The trial court erred in refusing, over the objections and exceptions of the defendant and appellant, to incorporate in its charge to the jury defendant's written Instructions Nos. 1, 1-A, 1-B, 1-C, 3, 4 and 6, and each of them said instructions thus refused being in the words and figures following, to-wit:

Note by District Clerk

For Defendant's Instructions Nos. 1, 1-A, 1-B and 1-C, see page 153, et seq. of this record.

For Defendant's Instructions Nos. 3, 4 and 6, see page 155, et seq of this record.

6. The trial court erred in excluding from the hearing of the jury, over the objections of the defendant, the following testimony of the defendant's witness George B. Heide offered during direct examination:

"A. I searched the furniture store. We thought we smelled the odor of mash in that vicinity. We went down and smelled through some other place, and we searched, and we didn't find anything there.

Mr. Furbee: On how many occasions did you detect a smell or odor of mash——

Mr. Bachmann: We object. You are going into another question now.

Mr. Furbee: Let me finish—within the seven days next preceding the date of the fire.

Mr. Furbee: I mean in that immediate vicinity.

The Witness: Now, that is just a little hard. That has been quite awhile ago. I know two or three occasions we were there. I will say that. I feel confident we was there on two or three occasions, and I know we smelled mash there, but to draw down to conclusions, I can't just say.

The Court: Can you say how long before the fire these occasions were?

The Witness: Only my statement the first time. That is as near, Judge, as I would like to answer.

The Court: State it again.

The Witness: A week or two.

Mr. Furbee:

[fol. 167] Q. How close is the furniture store that you searched to the property known as 1312 Main Street?

A. This furniture store is either the second or third door below the National Bank of West Virginia.

Mr. Bachmann: The furniture store that he has reference to is over a full block and a half away from 1312 Main Street. Being next to the National Bank of West Virginia, it is about 1218 Main Street.

Mr. Furbee: It is approximately a half block.

Mr. Handlan: It is three-quarters.

The Court: How far is the furniture store in question from the Bachmann building that was burned, Mr. Heide?

The Witness: Your Honor, I would say it was a block at least."

7. The trial court erred in excluding and in striking out the following testimony of the defendant's witness Alonzo Prince offered upon direct examination:

"Prior to the fire in the Bachmann Building I had not observed or found any evidence of moonshine stills operating in that immediate vicinity. I had observed certain unusual odors pertaining to moonshine mash in that vicinity. I had observed the odor of mash coming very strongly from the sewer at the intersection or junction of 13th Street and Main Street about the first part of December, 1925. The Bachmann Building is located at 1312 Main Street, and this was on Alley 13, at the corner of 13th Street. I presume that all of the buildings run into that sewer. I checked on this odor by moving from one place to another in the vicinity and always traced the odor back to this one place. I went to the corner of 14th Street, and did not get any odor there, and then I came up to the corner of 12th Street, and likewise did not get the odor. I presume the entire section there drains into that sewer. I judge it was approximately 250 feet from the place where I detected the odor in the sewer to the back of the Bachmann Building."

8. The trial court erred in excluding from the hearing of the jury the following testimony of the plaintiff's wit- [fol. 168] ness Charles F. Bachmann offered upon cross examination:

"Q. Mr. Bachmann, following the fire in the Bachmann Building on December 27, 1925, is it not a fact that you were indicted by a Federal Grand Jury of the Federal Court at Wheeling, West Virginia, by the United States Government, charged with conspiracy to violate the National Prohibition Act, in connection with the operation

of the stills found in the building by the prohibition officers?

A. Not shortly. It was several months afterwards.

Q. That is, you were indicted some time after the fire?

A. Yes, sir.

Q. How long was that indictment pending here before the Federal Court, Mr. Bachmann?

A. About three years.

Q. It was my understanding that eventually the indictment was dismissed—nolled by the United States Government—is that correct?

A. Yes, sir.

Q. Mr. Bachmann, the prohibition officers never caught Bill Varisca, so far as you know, did they?

A. I don't know.

Q. You didn't see him again?

A. No, sir."

9. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness A. S. Whitely offered upon direct examination:

"Q. Turn to rule 73 and read what that books says with respect to the particular sentence that you have just read in this rider.

Mr. Bachmann: Will you read Rule No. 1 to the jury?

The Witness (reading):

'Form No. 1. Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies.

'NOTE.—It is understood that the word "materials" as [fol. 169] used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

10. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness William Gutman offered upon direct examination:

"Q. Mr. Gutman, in connection with your business with Alexander R. Campbell, the insurance man, tell the jury whether or not you had occasion to go down there for the purpose of making some change in an insurance policy oc-

casioned by some change in the business that was going to be made there? Whether or not you were down there at that time?

A. Yes, sir, along early in 1925, I went down with Mr. Campbell.

Q. By Mr. Campbell you mean whom?

A. Mr. Alex R. Campbell, the man I worked for.

Q. The insurance man?

A. Yes, sir. I had some other business with Mr. Bachmann that morning. I told Mr. Campbell I was going down to see Mr. Bachmann, and he said 'Wait, I am going down, I have to look over the premises on account of——'

Q. Tell the jury whether or not you accompanied Mr. Campbell on that occasion?

A. I accompanied Mr. Campbell there and went there and met Mr. Bachmann.

Q. What did you see? What did Mr. Campbell see? What was being carried on there?

The Court: The witness may state what he saw.

Mr. Bachmann: State what you saw and what Mr. Campbell saw and where you saw the things that you are going to describe.

Mr. Furbee: He cannot state what Mr. Campbell saw.

The Court: The witness may state what he saw.

Question withdrawn.

Mr. Bachmann: What part of the Bachmann building did you go to on this occasion when you went there with Mr. Campbell?

A. Went to the office of Mr. Bachmann in the front of [fol. 170] the building on the second floor, and met him.

Q. Who was with you when you went to this office with Mr. Campbell, and what occurred there?

A. Mr. Bachmann walked out with us, opened the door and went out and met a man by the name of Mr. Huff, who he said was running this oil business, I think it was—I think it was Eze, or some such name.

Q. Auto Eze?

A. Yes, Auto Eze. He called Mr. Campbell's attention to the various barrels of oils and different things, cans, and everything, and Mr. Campbell told him that he would have to safe-guard himself—he would have to go to work and have

a can for the waste material—something in the way of a slop can, and also told him he would have to have receptacles under each of the barrels—the bungs of each barrel, to have something there to catch the oil—the drippings. There was a gas stove, and he would have to have a piece of zinc under that stove. And from there he went to the third floor.

Q. Before you leave the second floor, you say Mr. Bachmann took Mr. Campbell out and showed him these barrels of oil and cans?

A. No, Mr. Huff did.

Q. Were you there at the same time?

A. Yes, sir.

Q. And Campbell was there besides you?

A. Yes, sir.

Q. I wish, if you can, you would tell the different kinds of oils that you saw there or that were mentioned or pointed out, as to kerosene, carbon oil, gasoline, grease.

A. They mentioned grease; they mentioned oil; they mentioned gasoline, and some kind of a lubricating oil. That is the only thing I can recollect.

Q. You went, I believe, from the second floor to the third floor. Who went from the second to the third?

A. Myself, Mr. Campbell and Mr. Huff.

Q. Do you know whether his name is Ira P. Huff?

A. No, sir, I couldn't tell you that.

Q. He is a man that was, at least, conducting the business and giving the directions?

A. Yes, sir.

Q. What did you see on the third floor?

A. I don't recollect what I saw.

Mr. Guiher: I was waiting to make sure Mr. Hand-[fol. 171] land was through with this line of examination. This goes to the same extent that the Whitely evidence did some time ago. It involves the same proposition. I am going to make a motion, when he is through, to exclude this testimony. I will wait until Mr. Handlan is through.

Q. Mr. Gutman, Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 5, being insurance policies, one of the St. Paul Fire & Marine Insurance Company, and the other of the American Central Insurance Company, showing by their endorsements they were issued by Alex Campbell & Co.,

agents, each have attached to them what is called Form No. 4—a rider—that mentions the privilege given for 'bottling automobile oils, offices and other mercantile business not more hazardous', and signed 'Alex R. Campbell & Co.' Do you know whose signature that is?

A. Yes, sir, that is Mr. Campbell's signature.

Q. I will ask you whether you know whether or not the visit of Campbell and yourself to the Bachmann property at the time you mentioned, had any connection with the putting on of these riders?

A. Yes, that is what he went down for. He was called. He told me he was going down to see Mr. Bachmann—that he called him up."

11. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness Edward Bachmann offered upon direct examination:

I was frequently in the Bachmann Building on Main Street when the business was being carried on there by Mr. Huff and others. Various oils, gasoline and stains were used in the Auto-Eze business conducted there."

12. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness Edward T. Rose offered upon direct examination:

"Q. In order to present the matter concretely, Chief, I will now ask this question: You having had the experience you have had, with the Wheeling Fire Department, being present at the December 27, 1925, fire, at the prop- [fol. 172] erty on 1312 Main Street, having stayed there for about three hours and noted the intensity of the fire as it had progressed up to that time, what in your opinion would have happened to the cans of gasoline, or how would the fire *would* have affected the cans of gasoline, if there had been a five-gallon can of gasoline on the third floor located about twenty, twenty-five or thirty feet west of the east wall, and there had been twenty-five five-gallon cans of gasoline on the first floor located about twenty-five or thirty feet, approximately, west of the east wall, the cans being tin cans, square in shape, five gallons in quantity, and capped with screw tops, what would have happened to that gasoline in that fire as you saw it?

A. My opinion would be that the gasoline would have exploded. It could not have stood that heat.

Mr. Handlan: Now, Chief, if there was on the third floor of the building and near to where the five-gallon can was alleged to be, as I have described, its position in my question, and there were two gasoline compressors each being filled about half full of gasoline, and each of some twenty to twenty-five gallons capacity, and there were on the third floor—about twenty-five to thirty feet west of the east wall, what, in your opinion, would have happened to those gasoline compressors if they had that much gasoline in them?

A. I think they would have exploded, too."

13. The trial court erred in admitting, over the defendant's objections, the following testimony of the plaintiff's witness M. C. Kindelberger offered during direct examination:

"Q. Now, Mr. Kindelberger, if there had been in this building on the third floor a five-gallon can of gasoline, located about twenty to twenty-five feet west of the east wall, and two gasoline compressors, each containing a capacity of twenty to twenty-five gallons of gasoline, and each about half full of gasoline, on the third floor, located near this five-gallon can, and about twenty-five to thirty feet west of the east wall; and twenty-five five-gallon cans of gasoline down on the first floor, located between twenty and thirty feet, approximately, west of the east wall, the gasoline cans that I have described on the first floor being [fol. 173] square tin cans—ordinary gasoline cans, with screw caps for their tops, what, in your opinion would have happened to that gasoline if it had been there, as a result of that fire?

Objected to.

The Court: The witness may answer, from his experience as an expert, as to what in his opinion——

Mr. Handlan: Answering the question, in your judgment and experience in the fire department.

Objection. Overruled. Exception by defendant.

A. My opinion is that it would have exploded.

14. The trial court erred in admitting, over defendant's objections, the following testimony of the plaintiff's witness, Ashby Jackson, offered upon direct examination:

"Q. If there was a five-gallon can of gasoline on this third floor of this building during all the time that the fire was in progress, and there were two gasoline compressors also on the third floor, twenty or twenty-five gallon capacity, and each approximately about half full of gasoline, and these compressors and this five gallon can would be located on that third floor from approximately twenty to thirty feet from the east wall, west from the east wall towards the river, on that third floor, and with reference to one another were located from five to eight feet apart, and there was also twenty-five five-gallon cans of gasoline on the first floor, which was there during the entire progress of the fire, from your experience as a fireman—and assuming that these twenty-five five-gallon cans were to the rear rather than to the front—and they were possibly twenty-five to thirty feet west of the east wall on that first floor, from your experience as a fireman——

The Court: Mr. Handlan, I believe you have not stated whether or not those cans were closed?

Mr. Handlan (continuing): —and that the cans of gaso-[fol. 174] line on the first floor and the can of gasoline on the third floor were closed or secured with a screw top, and that the compressors were topped and practically tight, what in your opinion would have happened to that gasoline in those compressors and in those various cans I have described, as the result of that fire, as you saw that fire that night? What, in your opinion, would have happened to that gasoline?

The Witness: That gasoline, Mr. Handlan, would not stand that heat.

Q. How is that?

A. That gasoline you speak of would not stand that heat.

Q. What would have occurred?

A. It would explode. That would mean we would know it, because it is loud. You can see the flames, and there is no use putting water on gasoline. It simply helps it. It don't put it out."

15. The trial court erred in admitting, over the objections of the defendant, the following testimony of the plaintiff's witness Ira P. Huff offered upon direct examination:

"I was present at the building when the representatives of the different insurance companies came down and inspected the business for the purpose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rack along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some vegetable oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflammability. Based upon this information, we were instructed to put dripping pans under [fol. 175] each spigot of the drums, and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this. I was in the Bachmann Building conducting this business from about June 1, 1925, until November 1, 1925."

16. The trial court erred in excluding from the hearing of the jury, over the objections and exceptions of the defendant, the following testimony of the plaintiff's witness Ira P. Huff offered upon cross examination:

"Mr. Guiher:

Q. Mr. Huff, I will ask you if on or about the 6th day of July, 1928, I did not examine you under oath in connection with the fire which you had on the Island, during the course of which I interrogated you regarding the materials and apparatus that you used in this process of bottling automobile oils?

Objection. Sustained. Exception by defendant.

The jury was here excluded from the court-room, and the following proceedings were had in the absence of the jury:

The last question was read.

The Witness: Yes, we did.

Mr. Handlan: We move to exclude the answer.

The Court: Suppose you let it go through until we get through. This is without the hearing of the jury.

Mr. Handlan: I did not want the Court to think we were waiving anything.

Mr. Guiher: Mr. Huff, during the course of that examination, did I not ask you if in your process of bottling automobile oils, you used any gasoline?

A. Yes, sir.

Q. Did you not say no?

A. Because the conditions were different.

Q. You admit that you told me at that time no you didn't, don't you?

[fol. 176] Mr. Handlan: Where do you mean used gasoline—at the Bachmann building or on the Island?

Mr. Guiher: I asked him about his process. I did not understand his process to be changed. He can make any explanation he wants to.

The Witness: Yes."

17. The trial court erred in admitting, over the objections of the defendant, the following testimony of the plaintiff's witness Carl G. Bachmann offered upon direct examination:

"While Huff was in the Main Street Building make the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the

insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business."

18. The trial court erred in excluding, over the objections of the defendant, the following testimony of the defendant's witness Professor Samuel Morris offered upon direct examination:

"Q. I will ask you to state, from your experience and investigation and study as to the comparative use of natural gas on the one hand, and gasoline on the other hand for heating these jets or burners or hot plates, particularly with reference to what precautions should be taken.

A. In heating with natural gas the chief danger lies in getting a mixture of gas and air, and in the case of using gasoline there is the same danger, of course, with gasoline, but there is the added danger of keeping the supply to be used.

[fol. 177] Now, the Bureau of Mines in its pamphlet that I have referred to on hazards in handling gasoline, by George A. Burrough, says that the supply of gasoline to be used in a burner in a building or to be used in a building in any way, especially in use of a burner, should be kept outside of the building, a safe distance from the building and buried under ground, and that the gasoline should be pumped—the supply should be pumped into the building through pipes that drain backward to the container. That is, if you pump in for a small supply at the time, if a supply is to be needed, that should be pumped in and not be carried in vessels. And if it is to be carried in vessels, they should be closed vessels, and he says to use as small an amount as possible.

Q. Now, Professor, in your examination the other day, you testified that you had seen the gasoline compressor tanks which were taken from the Bachmann building, or which were pointed out to you as being that?

A. I did.

Q. I believe at that time, Professor, you explained to the jury the method in which the gasoline was gotten from such tanks to the burner. What can you say with respect

to the proper or safe location of such a gasoline compressor tank that is to be used to heat open jets or burners?

A. To such a container is attached the statement that this container should be placed outside the building in which the gasoline is burned.

Q. Just state the reason for that, if you know. What is the reason for not having the gasoline compressor tank within a few feet of the open burner?

A. There are several. In the first place, if in filling the containers there is any gasoline spilled that mixes with the air—vitalizes and mixes with the air and forms a dangerous combustible mixture which may float along the floor for several feet, and become ignited.

Q. Do you mean when filling the burner?

A. When filling the tank, I mean. If any gasoline is spilled or any should leak out, there is danger of ignition from an open burner.

Q. From your observation and examination of these gasoline compressor tanks which were pointed out to you as having been the ones involved in this case, how could they be filled? What manner was there or apparatus was [fol. 178] there for filling the tanks?

A. The only way of filling is to take off the cap and pour the liquid in.

Q. The cap on top of the tank?

A. Yes."

Wherefore, and by reason of the foregoing errors in the said final judgment, the said defendant and appellant prays that the said judgment may be reviewed and reversed.

St. Paul Fire & Marine Insurance Co., by Counsel.
Steptoe & Johnson, James M. Guiher, Russell L. Furbee, Counsel.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7 OF RULE 14 OF C. C. A.

(1) Petition for appeal filed February 3, 1930.

(2) Order allowing appeal entered February 3, 1930.

(3) Appeal and supersedeas bond approved and filed on February 3, 1930. Penalty: $6,000.00. Obligors: St. Paul

Fire & Marine Insurance Company and United States Fidelity and Guaranty Company. Conditioned for damages and costs.

(4) Citation. Dated February 3, 1930. Acceptance of service of citation dated February 5, 1930. Citation filed on February 8, 1930.

[fol. 179] STIPULATION UNDER RULE 23 OF C. C. A.—Filed February 3, 1930

It is hereby stipulated and agreed by and between counsel for Sophia C. Bachmann, appellee, and counsel for the St. Paul Fire & Marine Insurance Company, a corporation, appellant, that the Clerk of said District Court shall make up a transcript of the record in the above styled action in accordance with the precipe for such record signed and agreed to by counsel for both of said parties and furnished to said Clerk, and shall transmit the same to the Clerk of the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and that the said record shall thereupon be printed under the supervision of the Clerk of the said Circuit Court of Appeals in accordance with Rule 23 of said court.

Dated this the 1st day of February, 1930.

Handlan, Garden & Matthews, Counsel for Sophia C. Bachmann, Appellee, by J. Bernard Handlan, Steptoe & Johnson, Counsel for St. Paul Fire & Marine Insurance Company, Appellant.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed February 3, 1930

To Austin C. Merrill, Clerk of said District Court:

By agreement of the undersigned attorneys of record for the said plaintiff and the said defendant, you are hereby directed to prepare and certify to the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Vir-

ginia, a transcript of the record in the above styled action, which shall include the following papers:

1. The plaintiff's declaration herein, and the insurance policy filed therewith.

[fol. 180] 2. The defendant's general issue plea, and plaintiff's joinder therein.

3. The defendant's specifications of defense.

4. The plaintiff's reply in writing to the defendants specifications of defense.

5. Order entered on November 7, 1929, empaneling the jury and commencing trial.

6. All other orders entered during the trial of this cause between November 7 and November 12, 1929.

7. Final judgment ordered entered on November 13, 1929.

8. The defendant's bill of exceptions filed herein, including all exhibits therein set forth and referred to.

9. The orders entered herein on the 3rd day of February, 1930, filing the defendant's bill of exceptions and allowing appeal and supersedeas.

10. The defendant's written assignments of error filed herein.

11. The stipulation for printing under Rule 23, executed by counsel for both parties.

12. This precipe for the preparation of the record.

Dated this the 1st day of February, 1930.

Handlan, Garden & Matthews, Counsel for Sophia C. Bachmann, Appellee, by J. Bernard Handlan,
Steptoe & Johnson, Counsel for St. Paul Fire & Marine Insurance Company, Appellant.

[fols. 181 & 182] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 183] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

March 5, 1930, the transcript of record is filed and the cause docketed.

Same day, original petition for appeal, order allowing appeal, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the original exhibits (photostats) are certified up.

Same day, the appearance of Louis A. Johnson and James M. Guiher is entered for the appellant.

March 7, 1930, the appearance of J. Bernard Handlan is entered for the appellee.

March 10, 1930, the appearance of Russell L. Furbee is entered for the appellant.

[fol. 184] March 13, 1930, the appearance of Carl G. Bachmann and Chas. J. Schuck is entered for the appellee.

April 2, 1930, twenty-five copies of the printed record are filed.

April 17, 1930, stipulation of counsel to continue cause to the October term, 1930, is filed.

Same day, cause continued in open Court to October term, 1930, per stipulation of counsel.

September 18, 1930, stipulation and joint motion of counsel to continue cause to the January term, 1931, is filed.

ORDER CONTINUING CAUSE TO JANUARY TERM, 1931—Filed September 18, 1930

Upon consideration of the stipulation and joint motion for a continua[illegible]iled in the above entitled cause, and for good cause sho[illegible]

It is ordered that the above entitled cause be, and the same is hereby, continued from the October term, 1930, to the January term, 1931, of this Court.

September 18, 1930.

John J. Parker, U. S. Circuit Judge.

Argument of Cause

January 16, 1931 (January term, 1931), cause came on to be heard before Northcott, Circuit Judge, and Watkins and Webb, District Judges, and is argued by counsel, and submitted.

[fol. 185] In United States Circuit Court of Appeals, Fourth Circuit

No. 2997

St. Paul Fire & Marine Insurance Company, a Corporation, Appellant,

versus

Sophia C. Bachmann, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

(Argued January 16, 1931. Decided April 13, 1931)

Before Northcott, Circuit Judge, and Watkins and Webb, District Judges

James M. Guiher (Russell L. Furbee and Steptoe & Johnson on brief) for Appellant and Charles J. Schuck and Carl G. Bachmann (Handlan, Garden & Matthews and Schuck, Bachman & Grimes on brief) for Appellee.

Opinion—Filed April 13, 1931

[fol. 186] Northcott, Circuit Judge:

This is an appeal from a judgment for $4,591.84 rendered in favor of the appellee, Sophia C. Bachmann, against the appellant, St. Paul Fire & Marine Insurance Company, a corporation, by the District Court of the United States for

the Northern District of West Virginia, at Wheeling, in November, 1929. The judgment was rendered in an action of assumpsit prosecuted upon a policy of fire insurance in the amount of $4,000.00 covering a three story brick business building located on Main Street in the City of Wheeling.

The insured building was badly damaged by fire in December, 1925, and it was claimed by appellant that three moonshine stills were found in the building after the fire, and that large quantities of gasoline, used in the operation of the stills, were in the building at the time of the fire, and the fire was caused by an explosion, due to the operation of the stills.

The building was managed by the husband of appellee, who as agent for the appellee had for many years attended to all the details of supervising, maintaining and leasing the building. It is conceded that appellee knew nothing about the building, the tenant, or the insurance. The building was leased to a man by the name of Varisca, in October, 1925, by appellee's husband, for a term of eighteen months, and appellee's husband testified that Varisca had paid him in advance the sum of $1,750 in cash on the rent, the building being leased supposedly for the purpose of conducting a wholesale business therein.

Evidence was offered on behalf of appellant, tending to show that Bachmann, the agent, knew or should have known that the building was used for operating stills. This was vigorously denied by Bachmann, and in submitting the case to the jury the judge instructed in the language of the policy.

Two main points are raised by appellant: (1) That in construing the "Increase of Hazard Warranty" the trial court erred in refusing to instruct the jury that an increase of hazard upon the insured premises was "within the control and knowledge of the insured", if the insured or agent had [fol. 187] "reasonable cause to believe or know" of the existence of the stills, even in the absence of actual knowledge; (2) That the trial court erred in its charge to the jury with respect to the Insurance Company's defense based upon the "Prohibited Articles Warranty" in the policy.

With respect to the Increased Hazard question, the policy provided as follows:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured."

We know of no authority contrary to the principle that an insurance policy will be construed in a manner most favorable to the insured. This has been held by this court. (Missouri State Life Insurance Company vs. Guess, 17 Fed. (2) 450, and cases there cited.)

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company, 263 U. S. 167, Mr. Justice Sutherland said:

"The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it. First National Bank vs. Hartford Fire Insurance Co., 95 U. S. 673, 678-679; Thompson vs. Phenix Insurance Co., 136 U. S. 287, 297; Imperial Fire Insurance Co. vs. Coos County, 151 U. S. 452, 462."

Here the judge below charged the jury in the language of the policy, and we think fairly. It is not incumbent upon the courts to write another or a different contract of insurance between the parties. Had the Insurance Company desired to add to the contract the words "reasonable cause to believe or know", it should have written the same into the policy, and we are of the opinion that the action of the judge below was right with regard to this question.

[fol. 188] On the second point, as to the Prohibited Articles Warranty, the policy provided:

"Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * explosives * * * gasoline * * * or any other petroleum product of greater inflammability than kerosene oil."

After the issuance of the policy, the use to which the building was being put at the time of the issuance of the policy being changed, an agent of the Insurance Company

inspected the building, and the following rider was attached to the policy:

"$4,000.00 on three story brick building, with approved roof, and its additions, adjoining and communicating, occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous, including foundations * * *

"Privileges granted. To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil * * * and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies."

The Handbook of Rules in use by the West Virginia Fire Underwriters' Association, used by Insurance Companies doing business in West Virginia in 1925, and required to be filed in the office of the Commissioner of Insurance of that State provided as follows:

"Privilege for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies."

"NOTE.—It is understood that the word 'materials' as used above, includes gasoline, and such other materials as [fol. 189] are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted."

At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being stored in the building. It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty, and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. The trial court took this view of the case, and we think properly so. The agent of the Insurance Company knew that the rider permitted the use of

gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact "within the knowledge and control" of the insured or her agent.

A number of other assignments of error were made with respect to instructions allowed or disallowed, and the admission of evidence, or the refusal to admit evidence, but an examination of the record does not disclose them to be of great importance, and none of them constitute, if error at all, vital error. It follows that the judgment of the court below upon the verdict of the jury is affirmed.

Watkins, District Judge, dissents.

[fol. 190] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia.

JUDGMENT—Filed and Entered April 15, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

April 15, 1931.

Elliott Northcott, U. S. Circuit Judge.

[fols. 191-213] Petition for rehearing, covering 24 pages, presented May 5, 1931, omitted from this print. It was denied and nothing more by order of June 29, 1931.

[fol. 214] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR REHEARING —Filed May 7, 1931

Upon the application of the Appellant, by James M. Guiher, Esq., its counsel, and it appearing to the Court that the Appellant has presented a petition for rehearing herein,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed, pending the action of the Court upon said petition for a rehearing.

May 7th, 1931.

Elliott Northcott, U. S. Circuit Judge.

[fol. 215] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2997

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Appellant,

versus

SOPHIA C. BACHMANN, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling

ORDER DENYING REHEARING—Filed and Entered June 29, 1931

This court having at its April term, 1931, rendered its decision affirming the judgment of the said District Court appealed from in this case, and the appellant having on May 5, 1931, presented to the Court a petition for a rehearing of the said case, and the same having been carefully considered,

It is now here ordered by this Court, that the rehearing asked for, be, and the same is hereby, denied at the cost of the appellant. Let mandate issue after the expiration of five days from this date.

June 29, 1931.

Elliott Northcott, U. S. Circuit Judge.

July 3, 1931, petition of appellant for a stay of the mandate is filed.

[fol. 216] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE PENDING PETITION FOR CERTIORARI —Filed July 3, 1931

Upon the application of the Appellant, by Steptoe & Johnson, Esqs., its counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the application of the Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 60 days from this date.

July 3, 1931.

Elliott Northcott, U. S. Circuit Judge.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 217] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,125. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 311. St. Paul Fire & Marine Insurance Company, petitioner, vs. Sophia C. Bachmann. Petition for writ of certiorari and exhibit thereto. Filed August 18, 1931. File No. 36,125.

FILE COPY

FILED
AUG 18 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
Counsel for Petitioner.

Clarksburg, W. Va.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

PAGE

III. The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25 38

IV. This case does not involve merely the question of correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question presented here is, therefore, of importance beyond the present case 40

Conclusion 42

Table of Cases Cited.

Bias v. Globe & Rutgers Co., 85 W. Va. 134, 138 24

Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110 24

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452 37

Leonard v. Northwestern Insurance Co., 290 Fed. 818 24

Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113 23

Lumber Underwriters v. Rife, 237 U. S. 605 25

Miller v. Union Assurance Society, 39 Fed. (2nd) 25 ..... 24, 38, 39

Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308 25

Penman v. St. Paul Co., 216 U. S. 311 25

Reed v. Merchants Assurance Co., 95 U. S. 23 24

PAGE

U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34 37
Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633 24

Statutes Cited.

Act of Congress of February 13, 1925, 43 Stats. 936 ..13
Arizona, Laws of 1913, Ch. 94, Sec. 56 41
California, Laws of 1909, p. 404 41
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075 41
Idaho, Laws of 1913, Ch. 185, Sec. 13 41
Iowa, Code of 1927, Secs. 9017 and 9018 41
Judicial Code, Secs. 237 (b) and 240 (a) 13
Louisiana, Laws of 1914, p. 493 41
Maine, Revised Statutes, Ch. 49, Sec. 4 41
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99 41
Michigan, Laws of 1917, No. 256, Sec. 243 41
Minnesota, Laws of 1923, Ch. 410 41
Nebraska, Revised Statutes of 1913, Sec. 3237 41
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1 41
New Jersey, P. L. of 1902, p. 437 41
New Mexico, Laws of 1925, Ch. 135, Sec. 66 41
New York, Laws of 1922, Ch. 268 41
North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10 41
Oklahoma, Laws of 1909, pp. 348 to 350 41
Oregon, Laws of 1917, Ch. 203, Sec. 22-H 41
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2 41
Rhode Island, P. L. 1921, Ch. 2094 41
South Dakota, Laws of 1909, Ch. 164, Secs. 1 and 2. 41
Virginia, Laws of 1928, pp. 763-766 41
Washington, Laws of 1915, p. 598, Sec. 12 41
West Virginia, Laws of 1923, Ch. 18 .....14, 41
Wisconsin, Laws of 1923, Ch. 291, Sec. 3 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. .....

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, St. Paul Fire & Marine Insurance Company, a fire insurance company, incorporated under the laws of the State of Minnesota, respectfully represents that it is aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit in the law action, entitled *St. Paul Fire & Marine Insurance Company v. Sophia C. Bachmann,* rendered on the 15th day of April, 1931 (WATKINS, *District Judge, dissenting*), a rehearing in said cause having been denied by order entered on the 29th day of June, 1931. By reason thereof, your petitioner prays for the allowance of a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

Summary of the Case.

I. This was an action at law instituted against petitioner by Sophia C. Bachmann (hereinafter referred to as "respondent") upon a fire insurance policy in the amount of $4000.00 which insured her three-story brick business building located on Main Street in the City of Wheeling, West Virginia. The insured building was damaged by fire on the evening of December 27, 1925. The suit originated in the District Court of the United States for the Northern District of West Virginia. The respondent obtained in the District Court a judgment against petitioner for the sum of $4,591.84, and the Circuit Court of Appeals, with one Judge dissenting, affirmed this judgment.

II. The important question before the Circuit Court of Appeals, which was decided adversely to your petitioner by a divided court, may be stated as follows:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a warranty providing for a forfeiture of the policy if gasoline and other dangerous articles are kept or used on the insured premises) a rider or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building for a purpose involving a far greater fire hazard, i. e., as fuel for the operation of a tenant's moonshine stills?*

III. The facts which give rise to the foregoing question in the present case are as follows:

(1) Under date of February 14, 1924, petitioner issued to respondent its policy of fire insurance for $4000.00 in the standard form prescribed for use in West Virginia by statute (Laws of West Virginia of 1923, Ch. 18). The insured building was described in the policy in the language following:

> "$4,000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*"

The policy also contained a paragraph bearing the heading "Privileges Granted", which included a provision commonly known as the "Work and Materials Clause" (for brevity it is hereinafter referred to as such) as follows:

> "* * * to do such work and to keep and use such materials as are usual in such occupancies."

The meaning of the Work and Materials Clause just quoted was explained by the following note found in the Handbook of Rules of the West Virginia Fire Underwriters Association which was filed in the office of the Insurance Commissioner of West Virginia, and hence became a part of the insurance contract (this is conceded by respondent; in fact, she introduced the Handbook of Rules in evidence in the trial court—R. p. 92):

> "Note: It is understood that the word 'materials' as used above, *includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted.*"

The policy issued to respondent also contained a warranty universally used in the standard fire insurance policy and commonly known as the "Prohibited Articles Warranty". This warranty was in the language following:

> "Unless otherwise provided by agreement in writing added hereto *this Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises;* fireworks, greek fire, phosphorus, explosives, benzine, *gasoline,* naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels."

At the time the policy was issued in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by Charles F. Bachmann, respondent's husband.

(2) In the Spring of 1925, one Huff leased the insured building and conducted therein for some months the business of manufacturing automobile oils. He used small quantities of gasoline in this manufacturing process, but as an ingredient, and not as fuel. According to Huff, the gasoline was used "as a driver in the penetrating oil to cut rust".

In April, 1925, during Huff's occupancy of the building, Carl G. Bachmann, respondent's son, and of counsel in the present case, suggested to respondent that it would be advisable to have a rider or endorsement attached to the policy since Huff was using the building for a purpose different from that specified in the policy. Thereupon, at the request of respondent, the building

was inspected by petitioner's agent, who, after having given specific directions for the safeguarding of the gasoline and other inflammable materials used by Huff in his manufacturing process, attached to respondent's policy, as a "Substituted Form", the following clause describing the occupancy of the premises:

> "$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*"

No other amendment or alteration was made in the provisions of the policy, either by addition or subtraction. Thus, the net result of the change made by the rider was merely to substitute for the words "occupied as Produce Store" the words "occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous"; and when this slight amendment is read and combined with the Work and Materials Clause quoted above, the explanatory note from the Handbook of Rules above referred to, and the Prohibited Articles Warranty, the composite result is the following:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline."
>
> "Occupied for bottling automobile oil, offices, and other mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

Giving to the rider the broadest effect possible, therefore, it is self-evident that the *absolute* prohibition

against gasoline in the Prohibited Articles Warranty was modified only in so far as gasoline might thereafter be used on the premises for three specific purposes, as follows:

1. For bottling automobile oils.
2. For offices.
3. *For other mercantile purposes not more hazardous.*

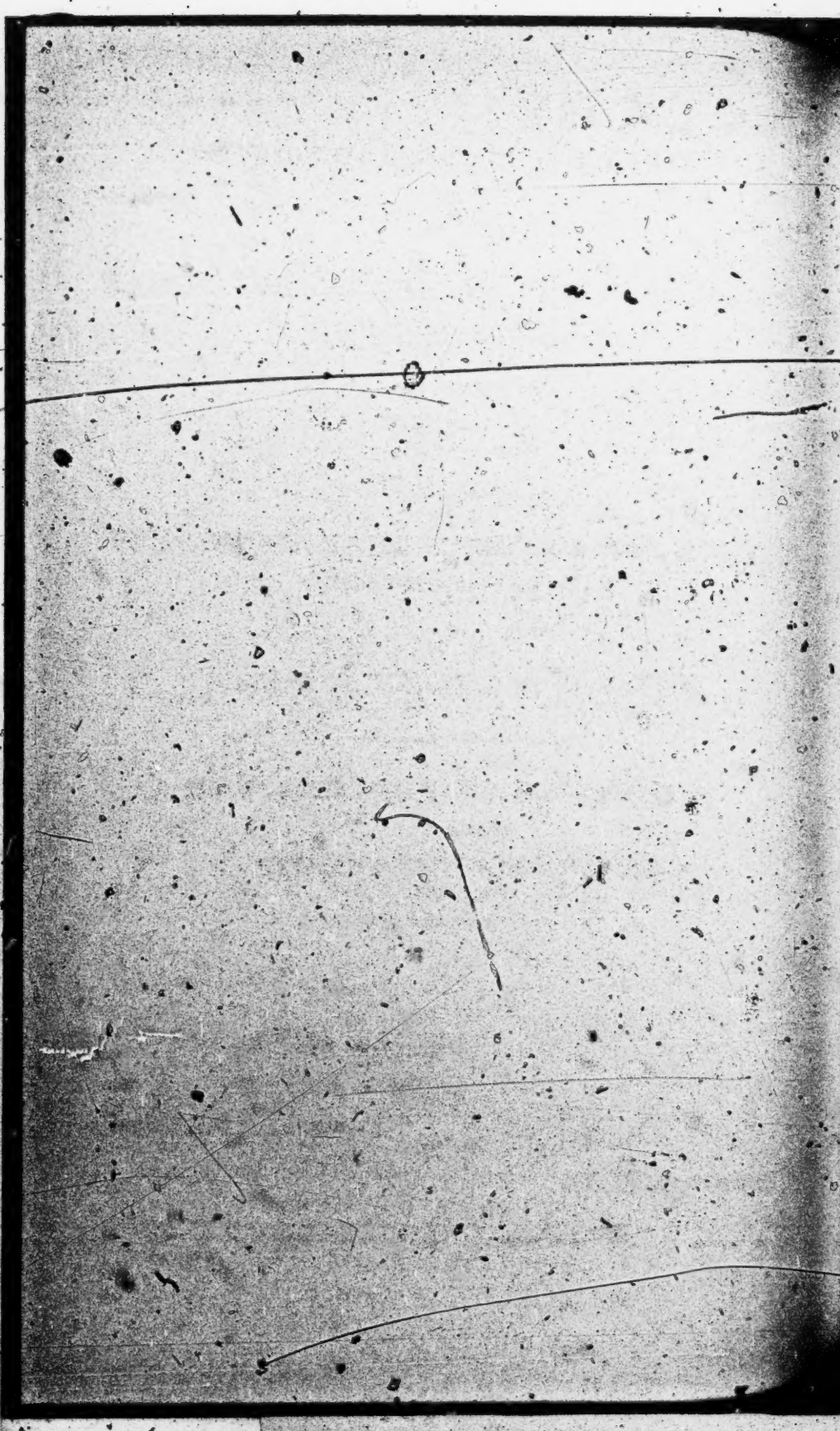
(3) It is conceded that Huff's occupancy of the Bachmann Building terminated on November 1, 1925, two months prior to the fire. On November 1, 1925, after Huff had vacated the premises, the insured building was leased for a term of eighteen months to one "Bill Varisca", an Italian, who was a complete stranger to the Bachmanns. Varisca said that he intended to use the building for a wholesale grocery business, but at the time of the fire on December 27, 1925, the building was supposedly empty and unoccupied. The only keys to the building, however, were in Varisca's possession.

(4) On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living nearby, the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero, and the water thrown upon the building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors in that vicinity, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills*, of about 150 gallons capacity each. The three stills were all designed for operation by *gasoline*, and when chopped out

of the ice after the fire, two of the compressor tanks attached to the hot plates supporting the boilers of the stills *contained large quantities of gasoline.* A number of five-gallon cans containing *gasoline* were also found in the building, as well as large quantities of moonshine mash, corn sugar, and rye grain.

(5) The officers made diligent search for the Italian tenant, Varisca, as soon as the moonshine stills were discovered. However, Varisca made good his escape and was never seen again in Wheeling.

(6) At the trial in the District Court petitioner contended that the storage and use of gasoline in the insured building by the tenant, Varisca, as fuel for the operation of his three moonshine stills, constituted a clear violation of the Prohibited Articles Warranty and forfeited respondent's policy, irrespective of whether respondent, as owner of the building, had knowledge of the tenant's act. Realizing full well that the lessor of an insured building must assume responsibility for the keeping of a prohibited article upon the premises, even though such article be kept without the knowledge or control of the lessor (see, for example: *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113; *Miller v. Union Assurance Society,* 39 Fed. (2nd) 25; *Leonard v. Northwestern Insurance Co.,* 290 Fed. 318; *Bias v. Globe & Rutgers Co.,* 85 W. Va. 134, at page 138, and *Westchester Fire Insurance Co. v. Ocean View Co.,* 106 Va. 633), respondent elected to rely upon the rider or endorsement described above which was placed upon the policy in April, 1925, respondent's contention being that this was, in effect a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. The District Court adopted respondent's theory of the case, and charged the jury accordingly, over petitioner's objections. We quote from the District Court's charge:



INDEX TO PETITION AND BRIEF.

	PAGE
Petition for Writ of Certiorari	1
Summary of the Case	2
Reasons Relied on for Allowance of Writ	9
Prayer for Writ	12
Brief in Support of Petition for Certiorari	13
The Opinion of the Circuit Court of Appeals	13
Grounds for Invoking Jurisdiction of This Court	13
Statement of the Case	13
Specification of Grounds Relied upon for Allowance of Certiorari	22
Argument	23
I. The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110	23
II. The decision of the Circuit Court of Appeals, in seeking to apply the rule of strict construction against petitioner where the provisions of the insurance contract in question are clear and unambiguous is in conflict with repeated decisions of this court, including Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34	26

ratus, did not, when attached to a fire insurance policy containing a Prohibited Articles Warranty which expressly forbade the storage or use of gasoline on the premises, eliminate gasoline from the Prohibited Articles Warranty, or allow it to be stored and used on the premises, "except for actual use in that gas apparatus" (see 116 U. S. at 130, and 134 U. S. at 115), and that "otherwise and for all other purposes and uses it (gasoline) is expressly prohibited" (116 U. S. at 130).

It was further held by this court in the *Gunther cases* that the act of the insured's tenant in keeping gasoline on the premises for an unauthorized use was, under the Prohibited Articles Warranty, binding on the insured, irrespective of whether such act was within the control or knowledge of the insured, because "a violation of these prohibitions by anyone permitted by the assured to occupy the premises is a violation by the assured himself" (116 U. S., at 128).

II.

The decision of the Circuit Court of Appeals, in seeking to apply the rule of strict construction against petitioner where the provisions of the insurance contract in question are clear and unambiguous, is in conflict with repeated decisions of this court," including Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34.

In its opinion, the Circuit Court of Appeals referred to the well established rule that in case of ambiguity or uncertainty in its meaning, an insurance contract will be construed most favorably to the insured, and strictly against the insurance company (R. p. 187). But this rule has no application where there is no am-

biguity, and an ambiguity can not be arbitrarily created in order to apply the rule. It is submitted that the provisions of the standard Prohibited Articles Warranty in respondent's policy, and of the rider added thereto, were entirely consistent and harmonious, and gave rise to no ambiguity whatsoever.

III.

The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25.

In *Miller v. Union Assurance Society, supra,* the Circuit Court of Appeals for the Eighth Circuit held that the storage and use of gasoline by a tenant on insured premises for the purpose of operating moonshine stills constituted a breach of the Prohibited Articles Warranty in the owner's policy, even though the owner had no knowledge or control thereof, and notwithstanding the fact that the policy contained a Work and Materials Clause essentially similar to the one found in respondent's policy.

IV.

This case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question presented here is, therefore, of importance beyond the present case.

In the supporting brief, attention is called to the statutes of the various states establishing a standard form of fire insurance policy. In all essential details,

including the Prohibited Articles Warranty, the terms and provisions of the standard policy prescribed for use in the several states are identical with the language of respondent's policy. Hence, the decision of the Circuit Court of Appeals in the present case, if permitted to stand, will afford a precedent for the emasculation of the Prohibited Articles Warranty in fire insurance litigation throughout the country.

* * * * * * *

Your petitioner files herewith a certified copy of the record of all proceedings had in this cause in the Circuit Court of Appeals for the Fourth Circuit, and in the District Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be allowed and awarded by your Honorable Court to the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit, and that the said judgment be reviewed and reversed by your Honors; and that your petitioner be granted such other and further relief in the premises as to your Honorable Court may seem meet and right. And so your petitioner will ever pray.

ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Petitioner.

PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
Counsel for Petitioner,
Clarksburg, W. Va.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

(Note: Index to brief included with Index to petition, *supra*).

I.

The Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in the present case was filed on April 15, 1931, and is found at pages 185 to 189 of the Record. The opinion is officially reported in 49 Fed. (2nd) 158. No additional opinion was handed down on the denial of a rehearing.

II.

Grounds for Invoking Jurisdiction of this Court.

This application for a writ of certiorari is made upon authority of Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936. As the right of this court to review by certiorari the question herein presented is clearly given by statute, no cases are cited to support such right.

III.

Statement of the Case.

The principal question presented to the Circuit Court of Appeals for the Fourth Circuit, and decided adversely to petitioner by a majority of the Court (WATKINS, *District Judge, dissenting*) was the following:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a war-*

ranty providing for a forfeiture of the policy if gasoline and other dangerous articles are kept or used on the insured premises) a rider or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building for a purpose involving a far greater fire hazard, i. e., as fuel for the operation of a tenant's moonshine stills?

The facts giving rise to this question have been briefly outlined in the foregoing petition, but will now be again summarized, with appropriate references to the Record.

In 1923, the form of fire insurance policy commonly known as the "New York Standard Policy" was prescribed for use in West Virginia by the Legislature of that State. Among the warranties in this standard policy is the "Prohibited Articles Warranty" referred to in the foregoing petition. We quote from the West Virginia statute (Laws of 1923, Ch. 18) prescribing the form and language of this warranty:

> "On and after January first, One Thousand Nine Hundred and Twenty-four, no fire insurance company, its officers or agents, shall make, issue or deliver for use any fire insurance policy, or the renewal of any such policy, on property in this State, other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein * * *."

"Unless otherwise provided by agreement in writing added hereto this *Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises*: fireworks, greek fire, phosphorus, explosives, benzine, *gasoline*, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (Italics ours.)

Under date of February 14, 1924, petitioner issued to respondent its policy of fire insurance for $4000.00 in the standard form prescribed by the West Virginia statute just referred to. This policy contained the Prohibited Articles Warranty required by the statute (R. p. 7). The occupancy of the insured building was described in the policy in the language following:

"$4,000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*" (R. pp. 5, 6) (Italics ours.)

At the end of a paragraph bearing the heading "Privileges Granted", the policy contained a Work and Materials Clause in the words following:

"* * * to do such work and to keep and use such materials as are usual in such occupancies." (R. pp. 4, 6.)

A note in explanation of the meaning of the above quoted Work and Materials Clause is found in the Handbook of Rules of the West Virginia Fire Underwriters Association. The Circuit Court of Appeals concedes in

its opinion that this explanatory note became a part of the insurance contract (R. pp. 188, 189). This note was as follows:

> "Note: It is understood that the word 'materials' as used above, *includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted.*" (R. p. 92). (Italics ours.)

At the time the policy was issued to respondent in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by respondent's husband, Charles F. Bachmann.

In the Spring of 1925 one Huff leased the insured building, and occupied the same until November 1, 1925, in connection with his business of manufacturing automobile oils (R. pp. 129, 130). He used small quantities of gasoline in this manufacturing process, but as an ingredient, and not as fuel. Huff testified that the gasoline was used "as a driver in the penetrating oil, to cut rust". (R. p. 134)

In April, 1925, during Huff's occupancy of the building, Carl G. Bachmann, respondent's son, and of counsel in the present case, suggested to respondent that as Huff was using the building for a purpose different from that specified in the policy, it would be advisable to have a rider or endorsement attached to take care of the situation. In explanation of the circumstances under which the rider was added to the policy, Carl G. Bachmann testified as follows:

> "While Huff was in the Main Street building making the automobile products I went down there

one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business." (R. p. 136)

Thereupon, at the request of the Bachmanns, the building was inspected by petitioner's agent, who, after having given specific directions for the safeguarding of the gasoline and other materials used by Huff in his manufacturing process (R. pp. 107, 136), attached to respondent's policy as a "Substituted Form", a rider or endorsement describing the change in occupancy of the premises in the words following:

> "$4,000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. p. 3) (Italics ours.)

No other amendment or alteration whatsoever was made in the provisions of the policy, either by way of addition or subtraction. Thus, the net result of the change made by the rider was merely to substitute for the words "occupied as Produce Store" the words

"occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous"; and when this slight amendment is read and combined with the Work and Materials Clause quoted above, the explanatory note from the Handbook of Rules above referred to, and the Prohibited Articles Warranty, the composite result is the following:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) * * * while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline."
>
> "Occupied for bottling automobile oil, offices, and other mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

It is not controverted that Huff's occupancy of the Bachmann Building terminated on November 1, 1925, two months prior to the fire (R. pp. 130, 132). On November 1, 1925, after Huff had vacated the premises, the Bachmann Building was leased for a term of eighteen months to one "Bill Varisca", an Italian who was a complete stranger to the Bachmanns (R. pp. 32-37). Varisca said that he intended to use the building for a wholesale grocery business, but at the time of the fire on December 27, 1925, the building was supposedly empty and unoccupied (R. p. 41). However, Varisca was in possession of the building and, as he had the only keys, no one else had access to it (R. pp. 37, 41).

On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living

nearby (R. pp. 50-52), the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero (R. p. 50). The water thrown upon the burning building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills,* of about 150 gallons capacity each (R. pp. 59, 60, 63, 67). The three stills were all designed for operation by *gasoline;* that is, the boilers of the stills sat upon hot plates which were fed with gasoline from three large compressor tanks attached thereto. When chopped out of the ice after the fire, two of the compressor tanks *contained large quantities of gasoline* (R. pp. 60, 65). The third compressor tank had apparently exploded (R. pp. 60, 65). A number of five-gallon cans *containing gasoline* were also found at various places in the Bachmann Building (R. pp. 60, 64, 67, 70, 74, 75, 90, 136, 137). Large quantities of moonshine mash, corn sugar, and rye grain were also found in the building by the officers.

As soon as the moonshine stills were discovered, the officers made diligent search for the Italian tenant, Varisca. However, Varisca made good his escape and was never seen again in Wheeling.

At the trial in the District Court petitioner contended that the storage and use of gasoline in the Bachmann building by the tenant Varisca, as fuel for the operation of his three moonshine stills, constituted a clear violation of the Prohibited Articles Warranty and

"You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*"

(7) Upon the appeal, the Circuit Court of Appeals for the Fourth Circuit (WATKINS, *District Judge, dissenting)* affirmed the judgment below, holding that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon the attachment of the rider. We quote from the majority opinion of the Circuit Court of Appeals:

"*At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of*

the case, and we think properly so. The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent." (R. p. 189) (Italics ours.)

(8) The judgment of the District Court was affirmed by the Circuit Court of Appeals on April 15, 1931. On May 5, 1931, petitioner filed a petition for rehearing. An order denying a rehearing was entered by the Circuit Court of Appeals on June 29, 1931. On July 3, 1931, the mandate of the Circuit Court of Appeals was stayed pending this application for certiorari.

Reasons Relied On for Allowance of Writ of Certiorari.

I.

The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

In the *Gunther cases, supra,* this court held that a permit or rider, which provided that gasoline might be used on the insured premises in a certain gas appa-

forfeited respondent's policy, irrespective of whether respondent, as the owner of the building, had knowledge of the tenant's act. The respondent realized full well the force of this argument, and therefore elected to rely upon the rider or endorsement hereinbefore described which was placed upon the policy in April, 1925, during the occupancy of the former tenant Huff, it being respondent's contention that this was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. The District Court was persuaded to adopt respondent's theory of the case and charged the jury accordingly, over petitioner's objections. We quote from the District Court's charge:

> "You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. p. 151). (Italics ours.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit the judgment of the District Court was affirmed by a divided court (WATKINS, *District Judge, dissenting*). It was held by the majority that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon

the attachment of the rider. We quote the pertinent portion of the opinion of the Circuit Court of Appeals:

> *"At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent." (R. p. 189) (Italics ours.)

IV.

Specification of Grounds Relied Upon for Allowance of Certiorari.

Petitioner urges and relies upon each of the four grounds for the allowance of a writ of certiorari which are set forth in the foregoing petition. For convenience, they are again briefly summarized:

1. *The decision of the Circuit Court of Appeals, in holding that the rider or endorsement attached to respondent's policy constituted a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty, is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.*

2. *The decision of the Circuit Court of Appeals, in seeking to apply the rule of strict construction against petitioner where the provisions of the insurance contract in question are clear and unambiguous, is in conflict with repeated decisions of this court, including Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34.*

3. *The decision of the Circuit Court of Appeals is, in substance and effect, in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2nd) 25.*

4. *This case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the states, and the question*

presented here is, therefore, of importance beyond the present case.

Argument.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, IN HOLDING THAT THE RIDER OR ENDORSEMENT ATTACHED TO RESPONDENT'S POLICY CONSTITUTED A "PERMIT" WHICH ELIMINATED GASOLINE ENTIRELY FROM THE PROHIBITED ARTICLES WARRANTY, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. GUNTHER, 116 U. S. 113, AND GUNTHER v. LIVERPOOL & LONDON & GLOBE INSURANCE CO., 134 U. S. 110.

This assignment of error was urged by petitioner in its petition for rehearing filed in the Circuit Court of Appeals (R. pp. 191 and 203-210).

In order that the conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this court in the *Gunther cases, supra,* may be properly and clearly presented, several preliminary points should be disposed of:

(a) *Effect of Prohibited Articles Warranty in respondent's policy in absence of rider.*

Leaving aside for the moment the rider or endorsement attached to respondent's policy in April, 1925, it is clear that the storage and use of gasoline in the Bachmann Building by the tenant as fuel for the operation of his moonshine stills would forfeit the policy, because in violation of the Prohibited Articles Warranty, irrespective of whether the respondent herself had any knowledge or control of the tenant's act:

Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113;

Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110;
Miller v. Union Assurance Society, 39 Fed. (2nd) 25;
Leonard v. Northwestern Insurance Co., 290 Fed. 318;
Bias v. Globe & Rutgers Fire Insurance Co., 85 W. Va. 134, at page 138;
Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633.

The Circuit Court of Appeals in the present case does not appear to question this well-settled rule of fire insurance law.

(b) *The circumstances surrounding the attachment of the rider.*

It is conceded by respondent's own witnesses that the rider upon which she relies was added to her policy during the time when the former tenant Huff was manufacturing automobile oils upon the premises, in order to make certain that such occupancy was permitted (R. pp. 107, 129, 130, 136). It is also undisputed that Huff used only a small quantity of gasoline as an ingredient in his manufacturing process (R. p. 134), and that his tenancy of the Bachmann Building terminated on November 1, 1925, two months before the fire (R. p. 130). Respondent, of course, does not contend that it was ever contemplated that the Bachmann Building should be used as a moonshine liquor plant, or that large quantities of gasoline should be stored and used therein as fuel for the operation of moonshine stills. That all these circumstances are material in determining the intention, purpose and effect of the added rider, if there be any ambiguity therein, is clear:

Reed v. Merchants Insurance Co., 95 U. S. 23.

(c) *No parol waiver or modification of Prohibited Articles Warranty.*

As respondent's policy contains the usual clause relating to the "waiver" of the printed provisions of the contract (R. p. 8), it is likewise clear, under repeated decisions of this court, that the Prohibited Articles Warranty could not be waived nor its language or effect modified, by what the petitioner's agent may have seen, or even by any verbal statements he may have made, during his inspection of respondent's building while the tenant Huff was manufacturing automobile oils therein:

Northern Assurance Co. v. Grand View Building Asso., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

(d) *The exact change in the language of respondent's policy made by the rider.*

It is self-evident that the circumstances surrounding the attachment of the rider do not support the sweeping construction which the majority of the Circuit Court of Appeals gave to it, and we come then to a consideration of the *exact language* of the rider, and the extent to which it purports on its face to emasculate or modify the Prohibited Articles Warranty, which contains an absolute prohibition against the storage and use of gasoline.

As we have pointed out before, the rider added in April, 1925, made only one slight change in respondent's policy. In place of the words "occupied as Produce Store" found in the original policy, the rider merely substituted the following words:

> "Occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous." (R. p. 3).

Hence, when the substituted language of the rider describing the occupancy of the insured building, the Work and Materials Clause, the explanatory note from the Handbook of Rules of West Virginia Fire Underwriters Association, and the Prohibited Articles Warranty are read and combined together, we get the following composite result (which, for brevity, we shall hereafter refer to as the "gasoline permit"):

> "Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring (d) while, any usage or custom to the contrary notwithstanding, there is kept, used or allowed on the described premises * * * gasoline * * *. (R. p. 7).
>
> "Occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous; gasolin eand such other materials as are prohibited by the printed provisions of the policy are permitted, *when kept and used for such purposes as are usual to the occupancies permitted.*"

Or, stated in another way, the so-called "gasoline permit" modified the absolute prohibition of the Prohibited Articles Warranty by allowing gasoline to be stored or used on the premises for the following purposes only:

(a) For bottling automobile oils.
(b) For offices.
(c) For other mercantile purposes not more hazardous.

Having now, by this preliminary analysis, determined the exact language of the "permit" added to respondent's policy, the conflict between the decision of the Circuit Court of Appeals in the present case and the decisions of this court in the *Gunther cases* becomes readily apparent.

THE GUNTHER CASES.

The recognized leading cases upon the subject of the construction and effect of a Prohibited Articles Warranty in a fire insurance policy, and the effect of a rider or "permit" modifying such warranty, are *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, and *Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110. Both of these decisions were handed down in the same cause, which was twice appealed to this court.

The judgment recovered by Gunther upon his fire insurance policy in the first trial of the case was reversed by this court in December, 1885 (116 U. S. 113). Upon the second trial, a verdict was returned for the plaintiff, but this was set aside by the trial court (34 Fed. 501). Upon the third trial, the lower court directed a verdict in favor of the Insurance Company, and the judgment was affirmed by this court in March, 1890, upon the second appeal (134 U. S. 110).

THE FACTS IN THE GUNTHER CASES.

In order to demonstrate the applicability of these two decisions to the present case, we shall briefly state the facts as they are related in the two opinions of this court.

The policy issued to Gunther described the insured building and the occupancy thereof as follows:

> "The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be oc-

cupied by a family when not in use as a hotel)." (134 U. S. at 111).

Following the clause just quoted was the following gasoline permit:

> "Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

A Prohibited Articles Warranty in the following language was contained in the policy:

> "Petroleum * * * benzine * * * naphtha * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * * otherwise this policy shall be null and void." (134 U. S. at 111).

The insured property, a hotel building, was owned by Gunther, but at the time of the fire, which occurred in August, 1879, was being occupied by a tenant, one Walker. For a period of about eleven years, gasoline had been used in the gasometer described in the permit for the purpose of furnishing light for the hotel building, but the use of this apparatus had been discontinued in the Fall of 1878, about a year prior to the fire. Evidence was adduced at the trial tending to show that at the time of the fire gasoline was being kept by the tenant Walker in the oil room of the hotel *for some purpose other than the operation of the gasometer*. As to the particular use being made of this gasoline by the tenant, Mr. Justice Matthews said (116 U. S. 118):

"There was evidence tending to show that gasoline, benzine or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic."

Gunther had no knowledge whatsoever of the gasoline being kept by his tenant.

THE RULINGS OF LAW IN THE GUNTHER CASES.

This court, in addition to holding that it was immaterial whether the owner of the insured property knew of the tenant's violation of the Prohibited Articles Warranty (see 116 U. S. at 128-9, and 134 U. S. at 115), *held that the permit on the policy to keep gasoline on the premises for use in a certain apparatus did not allow its keeping or use for an entirely different purpose.* Upon the first appeal, Mr. Justice Matthews, speaking for this court, said at pages 130 and 131 of 116 U. S.:

"The circuit court also erred in the charge to the jury that under the circumstances disclosed by the evidence it was no breach of the conditions of the policy to have in the oil room a quantity of gasoline although not intended for use in the gas apparatus, the use of which had in fact been discontinued if the oil room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

"* * * it is clear that the privilege indorsed on the policy, in the following terms: 'To use gasoline gas—gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process', *did not sanction the keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus.* There is no express permis-

sion to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. *Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privilege granted.* * * *"

"It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and in doing so would have been justified in obtaining, keeping, storing and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. *But if the privilege itself is not actually exercised, no such implication arises and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time."* (Italics ours).

And we quote from the opinion delivered by Mr. Justice Gray on the second appeal (134 U. S., at page 115):

"The clause following the description of the buildings in each policy, 'Privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process', does not affect

the case; *for the use of the gas apparatus had been discontinued some time before the fire; and, as has already been decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus.* 116 U. S. 130 (29:581)." (Italics ours).

In order that the conflict between the decisions in the *Gunther Cases* and the opinion of the majority of the Circuit Court of Appeals in the present case may be clearly visualized and understood, we have undertaken to make below a detailed comparison thereof, in opposite columns:

COMPARISON BETWEEN FACTS AND RULINGS OF LAW IN GUNTHER AND BACHMANN CASES.

GUNTHER CASES	BACHMANN CASE
1. *Prohibited Articles Warranty*:	1. *Prohibited Articles Warranty*:
"Petroleum * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * *; otherwise this policy shall be null and void." (134 U. S. at 111).	"Unless otherwise provided in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (d) while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline * * *". (R. p. 7).

2. *The Occupancy Clause:*

"The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

3. *The Gasoline Permit:*

"Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

2. *The Occupancy Clause, as Amended by Rider.*

"$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous." (R. p. 3).

3. *The Gasoline Permit*

(being the composite result of the amended Occupancy Clause embraced in the rider and the Work and Materials Clause as interpreted by the Handbook of Rules):

"Occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed conditions of the policy are permitted

when kept and used for such purposes as are usual to the occupancies permitted."

4. *Use of Gasoline when Permit Attached.*

At the time the permit was placed on the policy, gasoline was being used in the gasometer apparatus for the purpose of lighting the insured building.

4. *Use of Gasoline when Permit Attached.*

At the time of the attachment of the rider or permit, small quantities of gasoline were being used by the tenant Huff as an ingredient in the manufacture of automobile oils.

5. *Use of Gasoline at Time of Fire.*

The gasoline stored in the oil room of the insured hotel at the time of the fire was not being used in connection with the gasometer apparatus mentioned in the permit, but either in torches for lighting a pavilion or for lighting certain picnic grounds some distance away. (See 116 U. S. 118).

5. *Use of Gasoline at Time of Fire.*

The gasoline found in the Bachmann Building at the time of the fire was being used by the tenant Varisca to operate three large moonshine stills.

6. *Owner's Control or Knowledge of Gasoline.*

Gunther, the owner of the property, had no

6. *Owner's Control or Knowledge of Gasoline.*

The jury found that respondent had no knowl-

knowledge that his tenant, Walker, was keeping the gasoline on the premises.

7. *Holding of this Court.*

(a) That the permit did not eliminate gasoline from the Prohibited Articles Warranty, unless it was being used for the purpose specified in the permit. This court said, in part (116 U. S. 131):

"If the privilege itself is not actually exercised, no such implication arises; and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time." (Italics ours).

edge of the gasoline being kept on the premises by her tenant Varisca.

7. *Holding of majority of Circuit Court of Appeals.*

(a) That the rider, being construed as a "permit", eliminated gasoline altogether from the Prohibited Articles Warranty, irrespective of the use being made thereof. We quote from the majority opinion:

"It was contended on the trial below that *this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty* * * *. *The trial court took this view of the case, and we think properly so.*" (Italics ours).

(b) That Gunther was bound by the act of his tenant in keeping gasoline upon the premises, for a purpose not included within the permit, irrespective of whether Gunther had control or knowledge thereof. This court said, in part (116 U. S. 129):

"The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself." (Italics ours.)

(b) That after the rider or "permit" was attached, gasoline came under the Increase of Hazard Warranty — that is, the tenant might keep or use gasoline upon the premises for any purpose, provided respondent had no knowledge or control thereof. (R. p. 189).

We submit that this graphic comparison plainly demonstrates that the majority opinion in the *Bachmann Case* is absolutely in conflict with the principles enunciated by this court in the *Gunther Cases.*

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, IN SEEKING TO APPLY THE RULE OF STRICT CONSTRUCTION AGAINST PETITIONER WHERE THE PROVISIONS OF THE INSURANCE CONTRACT IN QUESTION ARE CLEAR AND UNAMBIGUOUS, IS IN CONFLICT WITH REPEATED DECISIONS OF THIS COURT, INCLUDING IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY, 151 U. S. 452, AND U. S. FIDELITY & GUARANTY CO. v. GUENTHER, 281 U. S. 34.

In its opinion, the Circuit Court of Appeals cites the well-established rule that where there is any ambiguity or doubt in the meaning of an insurance policy, the contract will be construed most strongly against the insurance company (R. p. 187). The propriety of the application of this rule of construction when the facts fit it is unquestioned.

In the present case, however, the rider or "permit" which the Circuit Court of Appeals undertook to construe in connection with the Prohibited Articles Warranty was, as we have heretofore demonstrated, in the following composite form:

> "Occupied for bottling automobile oils, offices and other mercantile purposes not more hazardous; *gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted when kept and used for such purposes as are usual to the occupancies permitted.*"

Here is no inconsistency, much less any doubt or ambiguity. The right to store or use gasoline is limited to certain definite purposes. The Circuit Court of Appeals was, therefore, not justified in invoking a rule of construction which this court has frequently held

must not be applied when the language of the contract is "clear and unambiguous".

In the recent case of *U. S. Fidelity & Guaranty Co. v. Guenther,* 281 U. S. 34, at page 37, this court quoted from the leading case of *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, 462, as follows:

> "It is settled * * * that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. *But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*" (Italics ours).

We do not deem it necessary to cite the many other decisions of this court in which the same pronouncement has repeatedly been made.

It is submitted that the Circuit Court of Appeals in the present case has so obviously misapplied the rule of construction which it cites as to merit a review by this court.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS, IN SUBSTANCE AND EFFECT, IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN MILLER v. UNION ASSURANCE SOCIETY, 39 FED. (2ND) 25.

In *Miller v Union Assurance Society,* 39 Fed. (2nd) 25, the Circuit Court of Appeals for the Eighth Circuit had before it a case very similar on the facts. There, also, an Italian tenant of the policyholder was, at the time of the fire, storing and using gasoline on the insured premises for the purpose of operating his moonshine stills. The court held that the tenant's act violated the Prohibited Articles Warranty and forfeited the policy. We quote from page 29 of the opinion:

> "It was further provided that said policies should become void 'if there be kept, used or allowed' on said premises gasoline or other explosives. Undeniably large quantities of gasoline and alcohol were kept and used on said premises by Armeno. Such articles were used in connection with the unlawful manufacture of alcoholic spirits. This was a violation of the contracts and warranted the appellee in declaring them void. *La Force v. Williams City Ins. Co.,* 43 Mo. App. 519; *Liverpool & London & Globe Ins. Co. v. Gunther,* 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575; *Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857; *Leonard v. Northwestern Nat. Ins. Co.,* 53 App. D. C. 343, 290 F. 318."

It was contended in the *Miller case,* as respondent does here, that the Work and Materials Clause in the policy permitted the storage and use of gasoline on the

insured premises. The Work and Materials Clause in Miller's policy gave him the right to use the premises, "as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law" (see 39 Fed, (2nd), at page 30).

The "business conducted therein" at the time Miller's policy was written was "the manufacture of water fillers, oil burners, ice can fillers, and other small appliances" (see 39 Fed (2nd), at page 29).

Bearing in mind that the rider or "permit" was attached to respondent's policy when the Bachmann Building was being used by the former tenant Huff for the legitimate manufacture of automobile oils, the following extracts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* are peculiarly pertinent to the case at bar:

> "It is contended by the appellant that the policies themselves contain no provision relative to the use of said premises. When the policies were written, the premises were occupied by the E. L. Miller Manufacturing Company. This company was engaged in the manufacture of water fillers, oil burners, ice can fillers, and other small appliances. Both parties knew the nature and hazards of this occupancy. It was unnecessary to stipulate in the contract the nature of the occupancy and the hazards thereof when both were well known to the contracting parties." (39 Fed. (2nd), p. 29).
>
> "Neither can the storing and use of gasoline and alcohol on said premises be excused or justified under the so-called work and materials clause of the policies. This provision reserves to the occupant the right to use 'the premises as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law.'

> "Obviously and admittedly the materials in question were used in violation of law as the premises were being used not only to violate the prohibitory laws of the government but the revenue laws as well." (39 Fed. (2nd) p. 30).

While the Work and Materials Clause in respondent's policy did not contain the words "when not in violation of any law", it did embody, as we have seen, a limitation no less plain and definite, *i. e.*, that the gasoline used on the premises must be "kept and used for such purposes as are usual to the occupancies permitted" (R. p. 92). It seems obvious, therefore, that the decisions of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* and of the Circuit Court of Appeals for the Fourth Circuit in the *Bachmann case*, involving substantially the same set of facts, are in hopeless conflict.

IV.

THIS CASE DOES NOT INVOLVE MERELY A QUESTION OF THE CORRECT INTERPRETATION OF AN ISOLATED PRIVATE CONTRACT; RESPONDENT'S POLICY, AND THE PROHIBITED ARTICLES WARRANTY CONTAINED THEREIN, ARE IN THE SAME STANDARD FORM REQUIRED TO BE USED BY STATUTE IN A MAJORITY OF THE STATES, AND THE QUESTION PRESENTED HERE IS, THEREFORE, OF IMPORTANCE BEYOND THE PRESENT CASE.

In recent years, the movement toward the establishment and adoption of a standard and uniform fire insurance policy has become almost universal. It will be found that in at least twenty-five states the so-called "New York Standard Policy" has been adopted by statute and no other form of policy may be used in such states:

Arizona, Laws of 1913, Ch. 94, Sec. 56;
California, Laws of 1909, p. 404;
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075;
Idaho, Laws of 1913, Ch. 185, Sec. 13;
Iowa, Code of 1927, Secs. 9017 and 9018;
Louisiana, Laws of 1914, p. 493;
Maine, Revised Statutes, Ch. 49, Sec. 4;
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99;
Michigan, Laws of 1917, No. 256, Sec. 243;
Minnesota, Laws of 1923, Ch. 410;
Nebraska, Revised Statutes of 1913, Sec. 3237;
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1;
New Jersey, P. L. of 1902, p. 437;
New Mexico, Laws of 1925, Ch. 135, Sec. 66;
New York, Laws of 1922, Ch. 268;
North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10;
Oklahoma, Laws of 1909, pp. 348 to 350;
Oregon, Laws of 1917, Ch. 203, Sec. 22-H;
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2;
Rhode Island, P. L. 1921, Ch. 2094;
South Dakota, Laws of 1909, Ch. 164, Sec. 1 and 2;
Virginia, Laws of 1928, pp. 763-766;
Washington, Laws of 1915, p. 598, Sec. 12;
West Virginia, Laws of 1923, Ch. 18;
Wisconsin, Laws of 1923, Ch. 291, Sec. 3.

Moreover, it is common knowledge, and we believe this court can take judicial knowledge of the fact, that in practically all of the forty-eight States, the "New York Standard Policy" is used in insuring property against loss by fire, whether actually prescribed by statute or not.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

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Fairmont, W. Va.,
PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
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INDEX TO BRIEF.

	PAGE
Introductory Statement	1
The Opinion of the Circuit Court of Appeals	2
Grounds for Invoking Jurisdiction of this Court	2
Summary of the Case	2
Specification of Errors to be Urged	20
Summary of Argument	22
Argument	27
I. In the absence of the "rider" or "permit", the storage or use of gasoline in the Bachmann Building by the tenant Varisca would unquestionably have forfeited the policy under the Prohibited Articles Warranty, irrespective of whether the respondent had "control or knowledge" thereof; the Prohibited Articles Warranty and the Increase of Hazard Warranty being entirely separate and distinct provisions	27
II. The language of the "rider" or "permit"; and the circumstances under which it was added to respondent's policy	34
III. The use being made of gasoline in the Bachmann Building at the time of the fire, to operate moonshine stills, was clearly not within the "permit"	42
IV. The use of gasoline to operate moonshine stills not being within the terms of the "permit" on respondent's policy, the decision of the Circuit Court of Appeals for the Fourth Circuit is in direct conflict with the decisions of	

PAGE

this Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110 48

V. The Circuit Court of Appeals, in approving the District Court's charge dealing with the Prohibited Articles Warranty, erroneously applied the rule of strict construction to respondent's policy and the "rider" thereon, contrary to decisions of this Court 58

VI. Aside from the decisions of this Court, the construction of the "rider" as a general gasoline "permit" by the District Court and the Circuit Court of Appeals is contrary to both Federal and State Court decisions involving essentially the same facts 60

Conclusion 70

Appendix A 72

Appendix B 75

Table of Cases Cited.

Allen v. Home Insurance Co., 133 Cal. 29 29
Badger v. Platts, 68 N. H. 222 29
Bias v. Globe & Rutgers Co., 85 W. Va., 134 ..... 22, 28
Colker v. Connecticut Fire Insurance Co., 218 Ky. 124 32
26 Corpus Juris, 221 29
4 Couch on Insurance, p. 3341 29
Duncan v. Sun Fire Insurance Co., 6 Wend. 488 29
Edwards v. Farmers Assn., 128 Ga. 353 29
Fayle v. Camden Fire Insurance Assn., 85 Mont. 248 ..... 32, 33

PAGE

German Fire Insurance Co. v. Shawnee County, 54 Kan. 732 29
Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110 ..... 22, 25, 28, 48, 63
Hickman v. Cabot, 183 Fed. 747 36
Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452 ..... 22, 25, 30, 33, 59
Jacksonville Adjustment Bureau v. National Ben Franklin Insurance Co., 1 Fed. (2nd) 800 ..... 26, 65
Jones v. Island Creek Coal Co., 79 W. Va. 532, at 539. 36
4 Joyce on Insurance, Sec. 2222 29
Kelly v. Worcester Insurance Co., 97 Mass. 284 29
La Force v. Williams City Insurance Co., 43 Mo. App. 519 63
Leonard v. Northwestern National Insurance Co., 53 App. D. C. 343, 290 Fed. 318 ..... 28, 63
Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113 ..... 22, 24, 27, 48, 62, 63
Long v. Beeber, 106 Pa. 466 29
Lumber Underwriters v. Rife, 237 U. S. 605 ..... 24, 42
Miller v. Union Assurance Society, 39 Fed. (2nd) 25 ..... 22, 24, 26, 28, 44, 62
Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 558. 37
Neal v. Clark, 95 U. S. 709 36
Newport Improvement Co. v. Home Insurance Co., 163 N. Y. 237 32
Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308 ..... 24, 42
Norwaysz v. Thuringia Insurance Co., 204 Ill. 384 ..... 22, 26, 29, 31, 66
Obermeyer v. Phoenix Insurance Co., 217 Ky. 590 .. 32
Penman v. St. Paul Co., 216 U. S. 311 ..... 24, 42
Ragley v. Insurance Co., 151 Wash. 545 32
Reed v. Merchants Insurance Co., 95 U. S. 23 40
14 Ruling Case Law, 1197 29

Statutes Cited.

PAGE

Schaffer v. Hampton Insurance Co., 235 N. W. 618 and 236 N. W. 327 (Minn.) 24, 45, 46
Swift v. Patrons Insurance Co., 125 Me. 255 29
Taverna v. Palatine Insurance Co., 238 N. Y. S. 389 ..... 24, 45
Truschel v. Rex Amusement Co., 102 W. Va. 215 ... 44
United States Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34 ..... 26, 59
Vandervolgen v. Manchester Fire Insurance Co., 123 Mich. 291 ..... 26, 68
Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633 29
Whitlatch v. Mutual Fire Insurance Co., decided by the Supreme Court of Appeals of W. Va., Oct. 13, 1931 ..... 24, 26, 46, 60

Statutes Cited.

Act of Congress of February 13, 1925, 43 Stats. 936. 2
Arizona, Laws of 1913, Ch. 94, Sec. 56 75
California, Laws of 1918, Ch. 210, Sec. 4075 75
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075 75
Idaho, Laws of 1913, Ch. 185, Sec. 13 75
Iowa, Code of 1927, Secs. 9017 and 9018 75
Judicial Code, Secs. 237 (b) and 240 (b) 2
Louisiana, Laws of 1914, p. 493 75
Maine, Revised Statutes, Ch. 49, Sec. 4 75
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99 75
Michigan, Laws of 1917, No. 256, Sec. 243 75
Minnesota, Laws of 1923, Ch. 410 75
Nebraska, Revised Statutes of 1913, Sec. 3237 75
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1 75
New Jersey, P. L. of 1902, p. 437 75

Statutes Cited.

PAGE

New Mexico, Laws of 1925, Ch. 135, Sec. 66 75
New York, Laws of 1922, Ch. 268 75
North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10 76
Oklahoma, Laws of 1909, pp. 348 to 350 76
Oregon, Laws of 1917, Ch. 203, Sec. 22-H 76
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2. 76
Rhode Island, P. L. 1921, Ch. 2094 76
South Dakota, Laws of 1909, Ch. 164, Secs. 1 and 2. 76
Virginia, Laws of 1928, pp. 763-766 76
Washington, Laws of 1915, p. 598, Sec. 12 76
West Virginia, Laws of 1923, Ch. 18 76
Wisconsin, Laws of 1923, Ch. 291, Sec. 3 76

Wherever used, the "New York Standard Policy" contains a Prohibited Articles Warranty—that is, a condition providing that the policy shall be forfeited if certain dangerous articles (gasoline is almost always included in this classification) are stored or used on the insured premises, in the absence of written permission from the insurance company endorsed upon the policy. That the construction or interpretation to be given such standard Prohibited Articles Warranty is of considerable public importance when its use is so universal, and the value in the aggregate of property affected thereby is so great, can hardly be doubted; and we submit that the question which the Circuit Court of Appeals had decided adversely to petitioner in the present case—that is, whether a written "permit" from the Insurance Company to use a certain prohibited article on the premises for a definite and limited purpose thereafter eliminates such article entirely from the Prohibited Articles Warranty—is of equal importance. It is felt, therefore, that the question involved here should not be considered merely as a possible erroneous interpretation of an isolated private contract by the Circuit Court of Appeals, but as an issue of sufficient public importance to merit a review by this court.

For the foregoing reasons, your petitioner prays that a writ of certiorari be granted for the purpose of reviewing the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit herein complained of.

PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
Counsel for Petitioner.

Clarksburg, W. Va.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed on April 15, 1931, and is found at pages 176 to 180 of the Record. The opinion is officially reported in *49 Fed. (2nd) 158.* No additional opinion was handed down with the order denying the rehearing.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT.

As the writ of certiorari was applied for and granted upon authority of Sections 237(b) and 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stats. 936, and as the right of this court to review by certiorari the questions herein presented is clearly given by the Federal statutes referred to, no cases are cited to support such right.

SUMMARY OF THE CASE.

I. This was an action at law instituted by respondent against petitioner upon a fire insurance policy in the amount of $4000.00 which insured respondent's three-story brick business building located on Main Street in the City of Wheeling, West Virginia. The insured building was damaged by fire on the evening of December 27, 1925. The respondent instituted suit upon her policy and obtained a judgment in the District Court of the United States for the Northern District of West Virginia for the sum of $4591.84; and the Circuit Court of Appeals for the Fourth Circuit, *with one of the three Judges dissenting,* affirmed this judgment on April 15, 1931. Petitioner's application for a rehearing was denied on June 29, 1931.

II. The important question before the Circuit Court of Appeals, raised by petitioner's exceptions to the District Court's charge to the jury, and decided adversely to petitioner by a divided court, may be stated as follows:

> *Where there is attached to the New York standard form of fire insurance policy containing a "Prohibited Articles Warranty", (that is, a warranty providing for a forfeiture of the policy if gasoline or other dangerous articles are kept or used on the insured premises) a "rider" or "permit" providing that gasoline might be used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such "permit" automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building as fuel for the operation of a tenant's moonshine stills, without forfeiting the policy?*

III. The facts which give rise to the foregoing question in the present case may be summarized, in topical form and in chronological order, as follows:

(1) *The material provisions of the insurance policy as originally issued.*

Under date of February 14, 1924, petitioner issued to respondent a policy of fire insurance for $4000.00, in the standard form prescribed for use in West Virginia by statute (Laws of West Virginia of 1923, Chap. 18). The insured building was described in the so-called "Occupancy Clause" of the policy in the language following:

"$4,000.00 On four story brick building, with

approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*"

(R. 5). (Italics ours).

The policy also contained a paragraph bearing the heading "Privileges Granted", which included a provision commonly known (and hereinafter so referred to) as the "Work and Materials Clause", as follows:

"And for present and other occupancies not more hazardous, and to do such work and to keep and use such materials as are usual in such occupancies." (R. 3).

The opinion of the Circuit Court of Appeals (R. 179) indicates that it may have been under the impression that this Work and Materials Clause was not embraced in the original policy, but was added later at the same time as the "rider" hereinafter referred to. If so, the assumption was incorrect, for the Record clearly shows that the "Privileges Granted" paragraph, which includes the Work and Materials Clause, was incorporated in the policy from its inception, and no change whatsoever was made therein when the "rider" was attached in April, 1925. In preparing the Transcript of the Record, the District Clerk, to avoid repetition, only copied once into his transcript the paragraph headed "Privileges Granted" (R. 3), but his cross-reference at page 5 of the Record shows that no change was made in this paragraph at the time of the attachment of the "rider".

The scope, intent and meaning of the Work and Materials Clause quoted above, so far as it relates to gasoline and other prohibited articles, are clearly and specifically explained by the following provision contained in the Handbook of Rules of the West Virginia Fire Underwriters Association filed in the office of the Insurance Commissioner of West Virginia:

"It is understood that the word 'materials' as used above, *includes gasoline* and such other materials as are prohibited by the printed conditions of the policy, *when kept and used for such purposes as are usual to the occupancies permitted.*" (R. 89). (Italics ours).

It is conceded that the foregoing provision should be treated as a part of the insurance contract; the respondent introduced the Handbook of Rules in evidence at the trial upon this theory (R. 89), and both the District Court and the Circuit Court of Appeals (see R. 179) adopted this view.

Among the provisions contained in respondent's policy were the following two standard warranties in the exact form prescribed by the West Virginia standard policy statute referred to above (Laws of West Virginia of 1923, Chap. 18):

(a) A warranty generally known as the *"Prohibited Articles Warranty"*, in the language following:

"Unless otherwise provided by agreement in writing added hereto *this Company shall not be liable for loss or damage occurring* * * * (d) while illuminating gas or vapor is generated, on the described premises; or *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises;* fireworks, greek fire, phosphorus, explosives, benzine, *gasoline*, naphtha or any other petroleum product of greater inflammability than kerosense oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. 6-7). (Italics ours).

(b) A warranty generally known as the *"Increase of Hazard Warranty"*, as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured." (R. 6-7).

At the time the policy was issued to respondent in February, 1924, the insured building was being used in connection with a produce or wholesale grocery business conducted by Charles F. Bachmann, respondent's husband. It is conceded that throughout the period of time involved in this case, Charles F. Bachmann looked after the insured building as respondent's agent (R. 31).

(2) *The "rider" or "permit" added to the policy.*

About April, 1925, the clause describing the occupancy of the insured building was amended by the attachment of a so-called "rider", which was in the language following:

> "$4000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. 3). (Italics ours).

This "rider", which the Circuit Court of Appeals held was equivalent to a general gasoline "permit" (see R. 179) made no change or amendment whatsoever in the provisions of the policy, either by addition or subtraction, (the "Privileges Granted" paragraph in the "rider" being precisely the same as in the original policy, R. 3, 5) except to substitute for the words "occupied as Produce Store" the words "occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous". This is obvious from the follow-

ing comparison of the original Occupancy Clause in the policy and the description of the occupancy of the building contained in the "rider":

Original Occupancy Clause:	*Occupancy Clause as amended by Rider:*
"$4000.00 On four story brick building, with approved roof, and its additions adjoining and communicating, *occupied as Produce Store.*" (R. 5). (Italics ours).	"$4000.00 on three story brick building, with approved roof, and its additions adjoining and communicating, *occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous.*" (R. 3). (Italics ours).

Hence, after the addition of the "rider", the provisions of respondent's policy pertaining to the storage or use of *gasoline* in the insured building were the following (we quote here, in sequence, the Prohibited Articles Warranty, the Occupancy Clause as amended by the "rider", the Work and Materials Clause, and the provision from the Handbook of Rules):

> "Unless otherwise provided by agreement in writing added hereto, *this Company shall not be liable for loss or damage occurring* * * * (d) * * * *while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises* * * * *gasoline* * * *". (R. 6, 7).
>
> "$4000.00 on three story brick building * * * *occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous.*" (R. 3).
>
> "And for present and other occupancies not more hazardous and *to do such work and to keep*

and use such materials as are usual in such occupancies". (R. 3).

"It is understood that the word 'materials' as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, *when kept and used for such purposes as are usual to the occupancies permitted."* (R. 89). (Italics ours).

Combining and condensing the provisions just quoted, we submit that the net result is the following:

"The policy will be forfeited if gasoline is kept, used, or allowed on the insured premises; provided, however, that such forfeiture shall not occur if gasoline be kept and used for such purposes as are usual to the following permitted occupancies: bottling Automobile Oils, Offices, or other *Mercantile* purposes not more hazardous."

We do not understand that the respondent questions the correctness of the foregoing condensation of the so-called gasoline "permit", except in one particular. She argues that the adjective *"Mercantile"* should be eliminated entirely from the last phrase of the "permit", so that instead of "for other *Mercantile* purposes not more hazardous", it would read "for other purposes not more hazardous". As we shall see later in the Argument, it is entirely immaterial, in so far as the questions presented on this review are concerned, whether the adjective "Mercantile" be included in the "permit" or not.

(8) *Circumstances surrounding attachment of "rider".*

In the Spring of 1925, before the "rider" was added, the insured building was leased to one Huff, who occupied the premises until November 1, 1925, and conducted therein during that period a business involving the

manufacture of automobile oils (R. 125-6). Shortly after Huff leased the building, it was suggested to respondent by her son, Carl G. Bachmann, who is of respondent's counsel in the present case, that as the building was being used for a purpose different from that specified in the Occupancy Clause of the policy, it would be advisable to have a rider attached to take care of this situation. In explanation of the circumstances under which the "rider" was added to the policy, Carl G. Bachmann testified at the trial as follows:

> "While Huff was in the Main Street building making the automobile products I went down there one afternoon and saw several barrels containing oil of some kind and also gasoline cans. I saw where oil had been dripping on the second floor. There was a scum of dirt practically all over that second floor and always had been since candy was manufactured in that building prior to these occupancies, and it was slippery on the floor where oil had dripped down in the process of that business. I suggested to Charles F. Bachmann that he send for the agents of the insurance companies, including Mr. Campbell, and have riders attached to the policies. This was shortly after Huff had come into the building, in the spring or summer of 1925, probably along in the early part of 1925. I assume Huff had been there possibly a month carrying on the business." (R. 131).

Thereupon, at the request of the Bachmanns, petitioner's agent visited the building. The tenant Huff, called as a witness for the respondent, testified as follows regarding the visit of the petitioner's representative:

> "I was present at the building when the representatives of the different insurance companies came down and inspected the business for the pur-

pose of adding the rider to the policy. These representatives were men by the names of Marker, Gutman, and Alexander R. Campbell, the insurance man. This was the same Will Gutman who has testified in this case. At that time we had a rock along the left side of the building as you went in on which were drums of oil. We had a hot plate at the end of the building. These oils consisted of kerosene, what we call neutral oil, some gasoline, and a barrel of cup grease. Campbell came up and put his hand under the spout to see whether there was any drip of the spigots of the barrels. Mr. Marker was there also. I was asked by both gentlemen as to the nature of the ingredients. They were plainly told as to the nature of the materials and the ingredients that went into the formulas of the articles we manufactured, with reference to their inflammability. Based upon this information, we were instructed to put dripping pans under each spigot on the drums, and we did so. We also were instructed to put a steel plate under the hot plate, and to provide a steel drum as a place to put refuse from the plant, such as paper and sweepings from the floor, and we did all this." (R. 125-6).

Other testimony in the case confirmed the fact that petitioner's agent, at the time of his inspection, gave detailed instructions as to the safety precautions to be taken in the storing of the materials used in Huff's business (R. 103).

Following the visit of petitioner's agent to the premises, the "rider" amending the Occupancy Clause of the policy was added, *but no other change or amendment whatsoever was made in the policy.*

The evidence shows that Huff used "some gasoline" (R. 125) in his manufacturing process, but it was em-

ployed as an ingredient, and not as fuel. According to the testimony of Huff, he used the gasoline "as a driver in the penetrating oil, to cut rust" (R. 130). Huff used natural gas as fuel (R. 129).

(4) *Occupancy of Bachmann Building at time of fire.*

It is conceded that the tenant Huff vacated the Bachmann Building on November 1, 1925 (R. 126-7), two months prior to the fire, which occurred on December 27, 1925. On November 1, 1925, the Bachmann Building was leased for a term of eighteen months to one "Bill Varisca", an Italian, who was a complete stranger to the Bachmanns (R. 35). Varisca stated that he intended to use the building for a wholesale grocery business, but at the time of the fire the building was supposedly empty and not in use, (R. 39). However, Varisca was in possession of the building, and as he had the only keys, no one else had access to it (R. 37, 39).

(5) *Moonshine stills and gasoline found in ruins of building.*

On the evening of December 27, 1925, after several muffled explosions had been heard by witnesses living nearby (R. 48-9), the Bachmann Building was badly damaged by fire. The day was bitterly cold, the temperature being two degrees below zero (R. 48). The water thrown upon the burning building by firemen immediately encased it in a mass of ice. As soon as the fire had subsided, and before the ice had melted away, State and Federal prohibition officers, who had for some time been looking for a moonshine plant in the neighborhood because of the observance of suspicious odors, found upon the rear of the third floor of the Bachmann Building *three complete moonshine stills,* of about 150 gallons capacity each (R. 57, 59, 61-70). The three

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

INTRODUCTORY STATEMENT.

This case is before the court upon a writ of certiorari to the judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit, which on April 15, 1931, affirmed, by a divided court, a judgment rendered by the United States District Court for the Northern District of West Virginia in favor of Sophia C. Bachmann (hereinafter referred to as "respondent") against the St. Paul Fire & Marine Insurance Company, a corporation, (hereinafter referred to as "petitioner") in an action at law upon a fire insurance policy. The Circuit Court of Appeals denied a rehearing to the petitioner by order entered on June 29, 1931. Petitioner's application for a writ of certiorari was granted by this court on October 26, 1931.

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the premises, even though such article be kept without knowledge or control of the lessor (see, for example; *Liverpool & London & Globe Insurance Co. v. Gunther*, 116 U. S. 113; *Miller v. Union Assurance Society*, 39 Fed. (2nd) 25; *Leonard v. Northwestern Insurance Co.*, 290 Fed. 318; *Bias v. Globe & Rutgers Co.*, 85 W. Va. 134, at page 138, and *Westchester Fire Insurance Co. v. Ocean View Co.*, 106 Va. 633), respondent elected to rely upon the "rider" attached to her policy in April, 1925, respondent's contention being that this was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty.

(b) That the presence and operation of the moonshine stills in the insured building (irrespective of whether gasoline was used in connection therewith) constituted an increase of the fire hazard to the premises in violation of the Increase of Hazard Warranty. To establish a breach of this warranty, of course, it was admittedly incumbent upon the petitioner to show that the increased hazard was, "within the control or knowledge of the insured" (R. 7). Substantial evidence was offered at the trial tending to show that Charles F. Bachmann, respondent's admitted agent, knew before the fire that the tenant Varisca had the stills in the building. This issue was submitted to the jury, and the jury resolved the question in favor of the respondent. In the Circuit Court of Appeals, petitioner complained that the District Court's charge did not correctly submit this issue to the jury. However, since it is believed that this case turns upon the District Court's charge with respect to the Prohibited Articles Warranty, we shall not add to the length of this brief by any further discussion of the trial court's charge under the Increase of Hazard Warranty.

(7) *The District Court's charge on the Prohibited Articles Warranty.*

The District Court adopted *in toto* respondent's theory that the "rider" was, in effect, a "permit" which eliminated gasoline entirely from the Prohibited Articles Warranty. This appears in the charge in two different aspects:

(a) The District Court ruled that the petitioner was "estopped", on account of the "rider", from relying on its defense that the Prohibited Articles Warranty had been violated by the presence and use of gasoline on the premises. We quote the pertinent part of the District Court's charge on this point:

> "You are also charged by the court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff *since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. 146). Italics ours).

(b) Throughout its charge, the District Court ruled that the keeping or use of gasoline in the building would not forfeit the policy, in any event, unless shown to be "within the control or knowledge" of the respondent or her agent—which was, of course, merely another way of saying that in so far as *gasoline* was concerned, petitioner was not entitled to rely on the

strict provisions of the Prohibited Articles Warranty, but must confine its defense to the Increase of Hazard Warranty. The following extracts from the District Court's charge are typical:

"PLAINTIFF'S INSTRUCTION NO. 2.

The jury are further charged by the Court that under the second Assignment of Grounds of Defense, the said defendant Insurance Company must prove by a preponderance of the evidence that at the time of the fire complained of and prior thereto large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises and that such keeping, using and allowing of gasoline was well known to the plaintiff, Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, and unless the said defendant has proven by a preponderance of the evidence the presence of gasoline, explosives, mash and other highly combustible substances upon said premises at and before the time of the fire *and has also proven by a preponderance of the evidence that such keeping, using and allowing was well known to the plaintiff Sophia C. Bachmann, and/or Charles F. Bachmann, her agent, such keeping, using and allowing of gasoline on said premises constitutes no defense for the defendant Company in this action.*" (R. 142-3). (Italics ours).

"PLAINTIFF'S INSTRUCTION NO. 4.

The jury are charged by the Court that even though you may believe from the evidence that at and prior to the time of the fire complained of quantities of gasoline were kept or used upon the premises described in the policies of insurance *either for the operation of stills or for any other*

purpose and even though you may believe that at the time of the fire in question, stills were actually being operated upon the premises destroyed by fire, yet the Court charges you that such keeping and using of gasoline and such operation of stills that if neither the said plaintiff, Sophia C. Bachmann, nor her agent, the said Charles F. Bachmann, had any knowledge or control of such keeping and using of gasoline or such operation of stills, such keeping, using and operation will not invalidate the insurance policy issued by the defendant and sued on in this case. *That is to say that unless the plaintiff, Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation under such circumstances constitute no defense for the defendant Company."* (R. 144) (Italics ours).

"PLAINTIFF'S INSTRUCTION NO. 10.

To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that *the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca and/or his associates* and if on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the

plaintiff, Sophia C. Bachmann." (R. 147). (Italics ours).

Proper exceptions were taken and noted upon the record by petitioner with respect to all of these features in the charge to the jury (R. 154-6). Also, the petitioner specifically requested the District Court to embody in its charge instructions to the jury to the effect that it was not necessary for petitioner to prove that the keeping or use of gasoline in the insured building by the tenant was within the control or knowledge of the respondent or her agent (R. 148-150); but the District Court refused the requested instructions, and petitioner has preserved appropriate exceptions thereto. (R. 157).

It is apparent, therefore, that by the District Court's charge, only one question of fact was actually submitted to the jury—namely, whether or not the respondent or her agent had any "control or knowledge" of the moonshine stills or gasoline found in the Bachmann Building. The portion of the charge embodying Plaintiff's Instruction No. 10 quoted above, which purports to "sum up and state briefly and concisely the law applicable to the main issues in this case" (R. 147) plainly shows how the District Court narrowed down the issue of fact, so that the jury had no alternative except to return a verdict for the plaintiff, if it believed that neither the respondent nor her agent had any "control or knowledge" of the manner in which the insured building was being used by the tenant Varisca. In other words, the District Court confined the petitioner's defense entirely to the Increase of Hazard Warranty; the Prohibited Articles Warranty, with its stricter provisions, was ruled out of the case.

Upon the narrow issue thus submitted to it, the jury returned a verdict for the respondent, upon which,

after overruling petitioner's motion for a new trial, the District Court entered judgment (R. 20).

(8) *The decision of the Circuit Court of Appeals.*

Upon the appeal, the Circuit Court of Appeals for the Fourth Circuit (WATKINS, *District Judge, dissenting*) affirmed the judgment below, holding that the District Judge was right in ruling that gasoline was removed from the Prohibited Articles Warranty upon the attachment of the "rider". We quote from the majority opinion of the Circuit Court of Appeals:

> *"At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil,* and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, *the Insurance Company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent."* (R. 179-180). (Italics ours).

The judgment of the District Court was affirmed by the Circuit Court of Appeals on April 15, 1931, (R. 180). On May 5, 1931, petitioner filed a petition for rehearing. An order denying a rehearing was entered by the Circuit Court of Appeals on June 29, 1931, (R. 181-2). The writ of certiorari was granted by this Court on October 26, 1931 (R. 182).

SPECIFICATION OF ERRORS TO BE URGED.

The petitioner assigns as error the same matters which were urged in support of the application for certiorari. Stated in slightly different language, the petitioner's assignments of error are as follows:

I. *The Circuit Court of Appeals erred in approving the District Court's charge to the jury to the effect that the "rider" attached to respondent's policy eliminated gasoline entirely from the Prohibited Articles Warranty, so that any gasoline kept or used on the insured premises must be proven to be "within the control or knowledge" of the respondent or her agent in order to work a forfeiture of the policy.* This ruling by the majority of the Circuit Court of Appeals was erroneous, because:

(1) *The decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, *and Gunther v. Liverpool & London & Globe Insurance Co.,* 134 U. S. 110.

(2) *In applying the rule of strict construction to respondent's insurance policy and the "rider" thereon, wherein the language was "clear and unambiguous," the decision of the Circuit Court of Appeals is in conflict with Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, *and United States Fidelity & Guaranty Co. v. Guenther,* 281 U. S. 34.

(3) *Aside from the decisions of this Court, the interpretation given to respondent's policy and the "rider" thereon is contrary to well-settled principles of construction, as reflected by various Federal and State Court decisions construing similar "permits" on fire insurance policies.*

II. *The Circuit Court of Appeals erred in affirming the action of the District Court in refusing to charge the jury, at petitioner's request, that if at the time of the fire gasoline was being kept, used or allowed in the Bachmann Building by the tenant Varisca for the purpose of operating his moonshine stills, the policy was forfeited, whether or not the respondent had "control or knowledge" thereof.*

Since this assignment of error involves precisely the same questions of fact and law as I above, everything that is said in the Argument, *post*, applies equally to both assignments.

SUMMARY OF THE ARGUMENT.

I.

In the absence of the "rider" or "permit", the storage or use of gasoline in the Bachmann Building by the tenant Varisca would unquestionably have forfeited the policy under the Prohibited Articles Warranty, irrespective of whether the respondent had "control or knowledge" thereof.

The Prohibited Articles Warranty and the Increase of Hazard Warranty are entirely separate and distinct, and their provisions must not be confused:

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452;

Norwaysz v. Thuringia Insurance Co., 204 Ill. 334.

Under the Prohibited Articles Warranty, the storage or use of a prohibited article, such as gasoline, in an insured building by a tenant forfeits the policy; it is not necessary for the insurance company to prove, as it must in any defense raised under the Increase of Hazard Warranty, that the owner of the building had "control or knowledge" of the tenant's acts:

Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113;

Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110;

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Bias v. Globe & Rutgers Co., 85 W. Va. 134, at 138.

And see the many other authorities for this proposition cited in the Argument.

II.

Neither the language of the "rider" or "permit", nor the circumstances under which it was added to respondent's policy, admit of its construction as a general gasoline "permit", allowing gasoline to be used for the operation of moonshine stills.

When all of the provisions of respondent's policy which pertain to the storage or use of gasoline in the insured building, including the "rider" added to respondent's policy in April, 1925, are read and fitted together, the net result is merely a "permit" to use gasoline for the following purposes:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile* purposes not more hazardous.

It is conceded that the "rider" was added to the policy while a former tenant was bottling automobile oils in the insured building, and that it was never contemplated by the parties at that time that the building would be used for the manufacture of moonshine liquor with large stills operated by gasoline. The circumstances surrounding the attachment of the "rider" to the policy, therefore, do not support its interpretation as such a general gasoline "permit" as would allow a subsequent tenant to use gasoline as fuel to operate his moonshine stills.

Furthermore, the plain written provisions of the Prohibited Articles Warranty and the "rider" or "permit" must necessarily determine their scope and effect, and the extent to which gasoline might be used on the premises; the written warranties and conditions of the policy can not be modified, amended, eliminated, or waived by parol:

stills were all designed for operation by *gasoline;* that is, the boilers of the stills sat upon hot plates the burners of which were fed with gasoline from three large compressor tanks attached thereto. When chopped out of the ice after the fire, two of the compressor tanks *contained large quantities of gasoline* (R. 57, 62, 63). The third compressor tank had apparently exploded (R. 57, 63). A number of five-gallon cans *containing gasoline* were also found at various places in the Bachmann Building (R. 57, 58, 62, [illegible], 68, 71, 72, 131, 132). Large quantities of moonshine mash, corn sugar, and rye grain were also found in the building by the officers.

The witness Doerr (a Federal Prohibition Officer) explained the method by which the gasoline was used as fuel to heat the stills as follows:

> "The still was upon a hot-plate, operated by a gasoline compressing tank, or rather fed from a gasoline compressor tank. The method of operation of such a gasoline compressing tank is about as follows: The gasoline is placed in the gasoline compressing tank. The tank is then filled with air from a pump, an air-pump something like an automobile pump, which is attached to the tank. There is a gauge on the gasoline tank, and also a valve and a connection with a small lead pipe leading fr[illegible]n the gasoline pipe to the burner under the still, a[illegible] in that way the compressing tank will feed the fuel to the burner in an even manner. The gasoline goes to the burner under the pressure made possible by the air pump into the gasoline tank." (R. 57).

The witnesses Prince and Morris testified to the same effect (R. 64, 80). Morris, a Professor of Chemistry at West Virginia University, testified that the compressor tanks found in the Bachmann Building were

designed for use with gasoline (R. 80), and he also pointed out the dangers incident to such use in connection with a distillation process (R. 81). While the respondent produced at the trial a number of witnesses who had visited the building during and after the fire, and who testified, in substance and effect, that they "did not see any gasoline in the building", the overwhelming weight of the evidence, based upon the direct and positive testimony of the officers who found the moonshine stills and other articles, establishes the fact that large quantities of gasoline were being kept and used on the insured premises as fuel for heating the stills. One of the officers later used some of the gasoline found in the building to operate his automobile (R. 65, 68). However, it is not necessary to argue this factual question, because both the District Court and the Circuit Court of Appeals found that there was sufficient evidence to require its submission to the jury.

As soon as the moonshine stills were discovered, both the officers and Charles F. Bachmann, respondent's agent, (see R. 133) made diligent search for the Italian tenant Varisca. However, Varisca made good his escape and has never yet been apprehended.

(6) *The issues raised in the trial court.*

The following two issues were raised by the pleadings and evidence at the trial in the District Court:

(a) That the keeping and using of gasoline in the insured building, for the operation of the tenant's moonshine stills, constituted *a clear violation of the Prohibited Articles Warranty* in the policy, irrespective of whether the respondent or her agent had any "control or knowledge" of the tenant's acts. Realizing full well that the lessor of an insured building must assume responsibility for the keeping of a prohibited article upon

Northern Assurance Co. v Grand View Building Assn., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

III.

The use being made of gasoline in the Bachmann Building at the time of the fire was clearly not within the terms of the "permit".

When the fire occurred, the gasoline in the Bachmann Building was being used by the tenant Varisca to operate his three large moonshine stills. This was clearly not a *"Mercantile"* purpose, nor was it a purpose *"not more hazardous"*. The operation of a moonshine still plant in an insured building is held by the courts to be a "more hazardous" occupancy of the premises *as a matter of law*:—

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;
Taverna v. Palatine Insurance Co., 238 N. Y. S. 389;
Schaffer v. Hampton Insurance Co., 235 N. W. 618, and 236 N. W. 327, (Minn.);
Whitlatch v. Mutual Fire Insurance Co., decided by Supreme Court of Appeals of West Virginia on Oct. 13, 1931 (see *Appendix A*).

IV.

The use of gasoline to operate moonshine stills not being within the terms of the "permit" on respondent's policy, the decision of the Circuit Court of Appeals for the Fourth Circuit is in direct conflict with the decisions of this Court in Liverpool & London & Globe Insurance

Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

In the two *Gunther Cases*, this Court laid down the following two rules relating to the interpretation of Prohibited Articles Warranties in fire insurance policies:

(a) That where a prohibited article, such as gasoline, is kept or used upon insured premises by a tenant in violation of a Prohibited Articles Warranty, the policy is forfeited, irrespective of whether the owner of the property had "control or knowledge" of the tenant's act.

(b) That a rider or "permit" on the policy, giving permission to use a prohibited article on the premises for a certain specific purpose, does not allow its keeping or use either generally, or for an entirely different purpose.

The decision of the Circuit Court of Appeals for the Fourth Circuit in the present case is in direct conflict with both (a) and (b) above.

V.

The Circuit Court of Appeals, in approving the District Court's charge dealing with the Prohibited Articles Warranty, erroneously applied the rule of strict construction to respondent's policy and the "rider" thereon, contrary to decisions of this Court.

Since the language of the rider or "permit" was "clear and unambiguous", the Circuit Court of Appeals erred in seeking to enlarge its scope and effect by applying the rule of strict construction against the insurer:

Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452;

United States Fidelity & Guaranty Co. v. Guenther, 281 U. S. 34, at page 37.

VI.

Aside from the decisions of this Court, the construction of the "rider" as a general gasoline "permit" by the District Court and the Circuit Court of Appeals is contrary to both Federal and State Court decisions involving essentially the same facts.

In the following cases, among others, contrary conclusions were reached in construing similar "permits" on fire insurance policies:

Whitlatch v. Mutual Fire Insurance Co., decided by Supreme Court of Appeals of W. Va., on Oct. 13, 1931 (see *Appendix A*);

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Jacksonville Adjustment Bureau v. National Ben Franklin Insurance Co., 1 Fed. (2nd) 800;

Norwaysz v. Thuringia Insurance Co., 204 Ill. 334;

Vandervolgen v. Manchester Fire Insurance Co., 123 Mich. 291.

ARGUMENT.

I.

In the Absence of the "Rider" or "Permit", the Storage or Use of Gasoline in the Bachmann Building by the Tenent Varisca Would Unquestionably Have Forfeited the Policy Under the Prohibited Articles Warranty, Irrespective of Whether the Respondent Had "Control or Knowledge" Thereof; the Prohibited Articles Warranty and the Increase of Hazard Warranty Being Entirely Separate and Distinct Provisions.

In view of the fact that the Circuit Court of Appeals has laid such stress upon the "rider" added to the policy in April, 1925, we believe the proper method of approach to a determination of the effect of the "rider" upon the Prohibited Articles Warranty is to first ascertain how this Warranty would be construed in the absence of such "rider".

Since the decision of this Court in 1885, in *Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113, it has never been seriously questioned that under a Prohibited Articles Warranty in a fire insurance policy, the keeping or use of a prohibited article on the insured premises by a tenant forfeits the policy, whether or not the lessor of the insured building had any "control or knowledge" of the tenant's act. We quote from the opinion in that leading case delivered by Mr. Justice Matthews (116 U. S. 113, at pages 128, 129):

> *"A violation of these prohibitions by anyone permitted by the assured to occupy the premises, is a violation by the assured himself.* The Company stipulates that it will not assume the risk arising from the presence of the articles prohibited; and if they are brought upon the premises in violation of the policy by one in whose possession and control

the latter have been placed by the insured, he assumes the risk which the Company has refused to accept. In our opinion the defendant in error was chargeable with the acts of Walker if he brought upon the insured premises and stored in the oil room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises and, with the implied assent of the insured at least, was intrusted with the control and management of them. *And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequence of Walker's acts in doing that which, if done, the Company had stipulated that it would not be liable. The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself.* (Italics ours).

The principle thus laid down was adhered to by this Court on a subsequent appeal of the same case, reported in *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110; and, so far as we have been able to find, it has been followed with complete unanimity ever since by both Federal and State Courts. The following cases and texts illustrate how universally the *Gunther Cases* have been followed and cited on this proposition:

Miller v. Union Assurance Society, 39 Fed. (2nd) 25;

Leonard v. Northwestern Insurance Co., 290 Fed. 318;

Bias v. Globe & Rutgers Co., 85 W. Va., 134, at 138;

Westchester Fire Insurance Co. v. Ocean View Co., 106 Va. 633;
Norwaysz v. Thuringia Insurance Co., 204 Ill. 334;
German Fire Insurance Co. v. Shawnee County, 54 Kan. 732;
Badger v. Platts, 68 N. H. 222;
Swift v. Patrons Insurance Co., 125 Me. 255;
Long v. Beeber, 106 Pa. 466;
Allen v. Home Insurance Co., 133 Cal. 29;
Edwards v. Farmers Asso., 128 Ga. 353;
Kelly v. Worcester Insurance Co., 97 Mass. 284;
Duncan v. Sun Fire Insurance Co., 6 Wend. 488;
14 Ruling Case Law, 1197;
26 Corpus Juris, 221;
4 Joyce on Insurance, Sec. 2222;
4 Couch on Insurance, p. 3341.

The Circuit Court of Appeals for the Fourth Circuit does not, in so many words, profess to depart from this well-settled principle of fire insurance law; but we submit that, in effect, the Court has actually done so, because there is nothing in the so-called "rider", much stressed by the Circuit Court of Appeals, which differentiates this case from any of the other cases cited above.

As we conceive it, the fundamental error committed by both the District Court and the Circuit Court of Appeals was the failure to distinguish between the Prohibited Articles Warranty, which contains an *absolute* prohibition against the keeping of certain dangerous articles upon the insured premises (irrespective of whether the fire hazard be actually increased thereby or whether the owner of the property had control or knowledge thereof) and the Increase of Hazard War-

ranty, to establish a breach of which both of the elements last mentioned must be proven. The fact is that, though both are contained in the same policy, the Prohibited Articles Warranty and the Increase of Hazard Warranty are entirely separate and distinct. On this question, the decision of this Court in *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, is controlling. There, the fire insurance policy in question contained, among other provisions, the following two warranties (see 151 U. S. at page 453):

> (a) "This policy shall be void and of no effect if, without notice to this Company and permission therefor in writing endorsed hereon * * * the premises shall be used or occupied so as to increase the risk * * * or the risk be increased * * * by any means within the knowledge or control of the assured."
>
> (b) "This policy shall be void and of no effect if, without notice to this Company and permission therefor in writing endorsed hereon * * * if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

It appeared that the insured had employed mechanics to make repairs on the insured premises, in violation of (b), but he contended that in view of the provisions of (a), the policy would not be forfeited unless the making of the repairs actually increased the risk or hazard to the property. This Court, speaking through Mr. Justice Jackson, said at pages 463 and 464 of the opinion:

> "These terms and conditions of the policy present no ambiguity whatever. *The several conditions are separate and distinct, and wholly independent of each other. The first three of the above*

conditions depend upon an actual increase of risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not. The last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation of the condition of the policy, even though the risk might not have been, in fact, increased thereby. The condition that the policy should be void and of no effect if 'mechanics are employed in building, altering, or repairing the premises named herein', without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk." (Italics ours).

And the decision of the Supreme Court of Illinois in *Norwaysz v. Thuringia Insurance Co.*, 204 Ill. 334, is squarely in point on this proposition. We quote from the opinion, at page 339:

"Counsel for appellant cites numerous cases to the point that where there is a question whether or not the hazard was increased it is a fact to be determined by the jury. The cases undoubtedly support the doctrine, but neither the cases nor the doctrine have any application to the case under consideration. *To be sure, there was a clause in the policy which provided, 'or if the hazard be increased*

by any means within the control or knowledge of the insured,' but it is entirely separate from the clause which prohibits the keeping or use of gasoline. The paragraph begins, 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if,' and then follows a series of co-ordinate clauses, each punctuated by a semicolon. *Among these clauses are the two in question—the one prohibiting an increase of risk by any means within the knowledge or control of the insured; the other prohibiting the keeping or using of gasoline on the premises. They are entirely disassociated in fact, and there is no rule of construction that would require or suggest their connection."* (Italics ours).

And to the same effect is *Newport Improvement Co. v. Home Insurance Co.*, 163 N. Y. 237.

The erroneous conception of the Prohibited Articles Warranty formed by the District Court is illustrated by its reference, during the trial, to the following four cases (see R. 137):

Fayle v. Camden Fire Insurance Asso., 85 Mont. 248;

Colker v. Connecticut Fire Insurance Co., 218 Ky. 124;

Obermeyer v. Phoenix Insurance Co., 217 Ky. 590;

Ragley v. Insurance Co., 151 Wash. 545.

The District Court (and the Circuit Court of Appeals as well) entirely overlooked the fact that *in none of these cases was the Prohibited Articles Warranty involved,* the defense of the Insurance Company in each instance being based merely upon the allegation that moonshine stills were being operated upon the insured

premises in violation of the Increase of Hazard Warranty. Indeed, the Supreme Court of Montana, in *Fayle v. Camden Fire Insurance Association, supra,* pointed out the obvious distinction between the two warranties when it commented upon the failure of the Insurance Company in that case to show that gasoline was used in the operation of the moonshine stills found upon the premises. We quote from the opinion in the *Fayle Case*:

> *"There is no evidence to sustain the defense that gasoline or some other explosive was used to heat the still* or that the explosion resulted from any such; *nor is there any evidence tending to show that any benzine, benzole, gasoline or other explosive was kept, used, or allowed upon the premises. The provision of the policy relating to these substances (rigid in its operation) therefore has no further application to the question before us."*
>
> (Italics ours).

The two warranties being thus separate and distinct, it must be conceded that, in the absence of the "rider" added to respondent's policy in April, 1925, proof of the storage or use of gasoline in the Bachmann Building by a tenant (except possibly in so far as gasoline might be used in connection with the original permitted occupancy—the conducting of a produce store) would be sufficient to forfeit the policy, and it would not be incumbent upon petitioner, under the doctrine of *Imperial Fire Insurance Co. v. Coos County,* 151 U. S. 452, and the *Gunther Cases,* to show either (a) that the respondent had "control or knowledge" of the gasoline, or (b) that the presence of gasoline in the insured building actually increased the fire hazard.

We come, then, to the inquiry as to *what change the "rider" actually made in respondent's policy.*

II.

The Language of the "Rider" or "Permit"; and the Circumstances Under Which It Was Added to Respondent's Policy.

Before attempting to interpret or construe the so-called gasoline "permit", it is first necessary to determine its precise language and phraseology.

(1) *The language of the "permit".*

Both the original policy and the "rider" added in April, 1925 contained the paragraph headed "Privileges Granted"; and its language and provisions remained identically the same (R. 3, 5). The language of the original policy was changed by the "rider" in only one small particular; the words "occupied for bottling Automobile Oils, Offices, and other Mercantile purposes not more hazardous" were substituted in the Occupancy Clause in the place of the words "occupied as Produce Store". It has already been demonstrated (see "Summary of the Case", *supra*) that when the language of the rider is read together with other provisions of the policy relating to the storage and use of *gasoline* in the insured building (i. e., the Prohibited Articles Warranty, the Work and Materials Clause and the Handbook of Rules), the composite result, in condensed form, is the following:

> "The policy will be forfeited if gasoline is kept, used, or allowed on the insured premises; provided, however, that such forfeiture shall not occur if gasoline be kept and used for such purposes as are usual to the following permitted occupancies; bottling Automobile Oils, Offices, or other *Mercantile* purposes not more hazardous."

Hence, even if the "rider" be treated as a gasoline "permit", in the sense that it may have increased the number of permitted occupancies in connection with which gasoline might be used, we believe it can fairly be said that the "rider" itself, by plain and unambiguous language, provides that the storage or use of gasoline on the premises must be confined to the following purposes only:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile purposes not more hazardous.*

As we have mentioned before, the respondent apparently contends that the adjective *"Mercantile"* should be omitted from (c) above. This argument appears to be based upon the following words found in the Work and Materials Clause:

> "And for present and other occupancies not more hazardous." (R. 3).

However, in making this argument, respondent conveniently overlooks or disregards the fact that the language just quoted was in the policy from its inception, included in the paragraph headed "Privileges Granted" (R. 5). The "rider", which was added later, in describing the permitted occupancies of the insured building, used the words "other *Mercantile* purposes not more hazardous" (R. 3). Under these circumstances, we submit that, upon a fair construction of the "permit", the adjective "Mercantile" must be included as a word of limitation, and as such given its common and ordinary meaning. It hardly lies in the mouth of the respondent to urge that this adjective be omitted from the "permit" when it is expressly included in the "rider" upon which respondent bases her whole case.

Furthermore, the petitioner's contention that the adjective "Mercantile" must be read as a part of the so-called "permit" is supported by the familiar doctrine of *ejusdem generis.* As we have seen, the language of the Occupancy Clause of the "rider" is the following:

> "Occupied for bottling Automobile Oils, Offices, and *other Mercantile* purposes not more hazardous." (R. 3).

The Work and Materials Clause embodied in the "Privileges Granted" paragraph includes the following phrase:

> "And for present and other occupancies not more hazardous". (R. 3).

Hence, if there could be any doubt as to the meaning of the words "other occupancies" as used in the Work and Materials Clause, reference must be had to the nature of the occupancies *specifically* mentioned in the "rider". Under the doctrine of *ejusdem generis,* when *general* words are used in a contract after *specific* terms, the general words (in this instance, "other occupancies") will be limited and restricted in their meaning to things of like kind and nature with those specified:

> *Jones v. Island Creek Coal Co.,* 79 W. Va. 532, at 539;
> *Neal v. Clark,* 95 U. S. 709;
> *Hickman v. Cabot,* 183 Fed. 747.

In *Jones v. Island Creek Coal Company, supra,* the Supreme Court of Appeals of West Virginia construed a deed which, in addition to conveying certain minerals and mining rights, contained the following grant of an easement for the construction of tramways over the land conveyed:

> "Also with full rights of way to, from and over said premises by the construction and use of * * *

tramways * * * for the purpose of exploring, extracting, storing, handling, manufacturing, refining, shipping or transporting of said materials * * * *and for any other purpose whatsoever*". (Italics ours).

The West Virginia Court, in interpreting the effect of the italicized words in the grant of the easement, said in part at page 539 of the opinion:

"The defendant contends that it is entitled to build a tramroad over the 70¼ acres of land for any purpose whatsoever. We cannot give assent to this contention. While it may be said that this is the language of the grant we conclude that the particular enumeration of the purposes for which rights of way were granted to Buskirk by Curry were not varied or enlarged by the subsequent general clause, 'and for any other purpose whatever,' but must be confined to such purposes as are reasonably necessary to the production of the coal from such lands as may be owned and intended to be operated by the defendant in conjunction with the tract of 70¼ acres. The rule of construction in cases like this is laid down in Elliott on Contracts, sec. 1532 to be: 'The doctrine of *ejusdem generis* is applied in cases where there is a doubt as to the intention of the parties, and as a rule for the construction of contracts is stated to be that when general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature (*ejusdem generis*) with those specified."

Moreover, what this court said in *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, at page 558, is pertinent here:

"The ordinary rule in respect to the construc-

tion of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought."

Hence, in view of the several occupancies specifically mentioned in the "rider", we submit that the so-called gasoline "permit" applied only to *"Mercantile* occupancies not more hazardous"; and that permission granted thereby to store or use gasoline in the insured building was expressly limited not only to purposes "not more hazardous", but also to *"Mercantile* purposes".

However, it is unnecessary to labor the point here, for, as we shall see, the use of gasoline by the tenant to operate his moonshine stills did not fall within the terms of the "permit", whether the adjective "Mercantile" be considered as a word of limitation therein or not. We are therefore warranted in stating, as a positive fact, that the language of the "permit" allowed gasoline to be used in the Bachmann Building for the following purposes only:

(a) For bottling Automobile Oils.
(b) For Offices.
(c) For other *Mercantile* purposes not more hazardous. (Petitioner's contention).

or

(c) *For other purposes not more hazardous.* (Respondent's contention).

(2) *The circumstances surrounding the attachment of the "rider" do not support its construction as a general gasoline "permit".*

Of course, if the clear and unambiguous language of the "rider" negatives any general "permit" allowing the use of gasoline in the insured building for *any* purpose, there is no need to take time for a consideration of the circumstances under which the "rider" was added to the policy, in aid of its interpretation. But, as a matter of fact, we find that here the extrinsic circumstances themselves are wholly inconsistent with the construction given to the "rider" by the District Court and the Circuit Court of Appeals.

It is conceded by respondent's own witnesses, as we have seen, that the "rider" was added to the policy during the time when her former tenant Huff was manufacturing automobile oils upon the premises, in order to make certain that such occupancy was permitted (R. 125, 131); that Huff used only a small quantity of gasoline as an ingredient in his manufacturing process (R. 130), and even then he was required to take certain precautions about its storage and use (R. 103, 125-6); that Huff vacated the Bachmann Building on November 1, 1925, two months before the fire (R. 126-7); and that when the fire occurred, the building was in the possession of Varisca, the Italian tenant (R. 24, 37, 39). The undisputed evidence shows that the gasoline found by the officers in the Bachmann Building at the time of the fire was being used to operate Varisca's moonshine stills. Yet, respondent does not for a moment contend that, at the time the rider was added, it was contemplated that the Bachmann Building would be used as a

moonshine liquor plant, or that gasoline would be stored and used on the premises for heating moonshine stills. On the contrary, the contention of the respondent is that she was as much surprised at the use being made of her building by the tenant as was the Insurance Company.

That evidence of surrounding circumstances may be competent to assist in the interpretation of a written contract, where there is any doubt or ambiguity in its language, is an elementary principle (*Reed v. Merchants Insurance Co.*, 95 U. S. 23); but in the present case not only is the language of the contract so clear and unambiguous as to render a consideration of extrinsic circumstances unnecessary, but even the circumstances themselves negative, rather than support, the construction given to the "rider" by the District Court and the Circuit Court of Appeals.

(3) *The scope and effect of the "permit" must be determined from its language and written provisions; there can be no modification or waiver of the Prohibited Articles Warranty by parol.*

As we have seen, at the time when petitioner's agent visited the Bachmann Building, the tenant Huff was manufacturing automobile oils on the premises. The only information then given to the agent was that "some gasoline" was being used by Huff as an ingredient in his manufacturing process (R. 125). The agent did not see any moonshine stills being operated by gasoline; he was not informed that the respondent or her tenant intended to use gasoline for such purpose; and he did not make any representation to the respondent to the effect that such use of gasoline on the premises would be permitted by the "rider". Consequently, there is absolutely no foundation in fact for any argument that the conduct of

the agent, or what he said or did, constituted an attempted waiver or modification by parol of the Prohibited Articles Warranty.

Nevertheless, we find in the opinion of the Circuit Court of Appeals the following observation:

> "At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and *it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being used and stored in the building.*" (R. 179). (Italics ours).

We are unable to understand why the court has thus laid emphasis on the fact that "the agent of the Insurance Company saw that gasoline was being used and stored in the building", especially since what he saw had no connection whatsoever with the use of gasoline to operate moonshine stills. It would seem that the Circuit Court of Appeals may have been laboring under the impression that the Insurance Company could be bound by its local agent's knowledge or information of conditions prevailing upon or about the insured property, inconsistent with or in violation of the written provisions of the policy. If so, the Circuit Court of Appeals wholly overlooked the standard provision contained in respondent's policy providing that the written conditions and warranties of the contract can not be waived or otherwise amended by parol (see R. 8). Under repeated decisions of this Court, the effect or meaning of the Prohibited Articles Warranty, or any other written condition or provision in respondent's policy, could not be waived, eliminated, amended, or changed in any way by what petitioner's local agent may have seen when he inspected the Bachmann Build-

ing, by any information he then received, or by any verbal statements he may then have made:

Northern Assurance Co. v. Grand View Building Assn., 183 U. S. 308;
Penman v. St. Paul Co., 216 U. S. 311;
Lumber Underwriters v. Rife, 237 U. S. 605.

III.

The Use of Gasoline in the Bachman Building at the Time of the Fire as Fuel to Operate the Tenant's Moonshine Stills Was Clearly Not Within the Scope of the "Permit".

As we have seen, the only possible controversy as to the *language* of the "permit" is upon the question of whether the adjective "Mercantile" should be included or omitted. But whether this Court accepts the petitioner's or the respondent's contention on this subject, it is clear that the gasoline in the Bachmann Building when the fire occurred was being used for a purpose not covered by the terms of the "permit".

(1) *Under petitioner's interpretation of the "permit", the tenant Varisca's use of gasoline was not authorized thereby, because the manufacture of moonshine liquor, in addition to being "more hazardous", is not a "Mercantile purpose".*

The gasoline found in the Bachmann Building at the time of the fire was being used as fuel to operate the tenant Varisca's moonshine stills; there is not a scintilla of evidence in the record to the effect that the gasoline was being used for any other purpose (see R. 57-72). The method in which the gasoline was used to heat the stills was explained in detail by several witnesses (R. 57, 64, 80). In fact, the compressor tanks found with the stills were particularly designed for use with gaso-

line as fuel (R. 80). This being true, we do not see the necessity of any extended argument on the question of whether such use of gasoline on the premises fell within the terms of the "permit". Entirely aside from the question of whether this was a use "more hazardous" than in connection with "bottling Automobile Oils" or "Offices", *the illegal manufacture of moonshine liquor was clearly not a "Mercantile purpose".*

(2) *Even under respondent's interpretation of the language of the "permit", the operation of the moonshine stills constituted a "more hazardous" occupancy of the building, not covered by the "permit".*

We shall now assume, for the sake of argument, that the respondent is right in arguing that the adjective "Mercantile" was not a part of the "permit", and that the effect of the "rider" was to permit the use of gasoline for: (a) bottling Automobile Oils, (b) Offices, and (c) in connection with "other occupancies not more hazardous". Yet, the respondent must concede that the gasoline found in the Bachmann Building at the time of the fire was not being used either for (a) or (b) above; and it will be found equally clear, upon examination of the record, that (c) affords no comfort to the respondent.

It seems to us absurd to argue that the occupancy of the Bachmann Building by the tenant Varisca for the surreptitious and illegal manufacture of moonshine liquor, involving the storage and use on the premises of three 150 gallon stills, 50 or 60 barrels of alcoholic mash, and large quantities of gasoline, was "not more hazardous" than the use made of the premises by the former tenant Huff for the bottling of Automobile Oils. Huff made use of some inflammable liquids, but he was conducting a legitimate business, and it is undisputed that,

at the direction of petitioner's agent, appropriate precautions were taken by him to safeguard the materials used (R. 103, 125, 126). Huff used "some gasoline" (R. 125), but as an ingredient, not as fuel (R. 130); the fuel which he used was natural gas (R. 129). At the trial, the witness Morris, Professor of Chemistry at West Virginia University, testified as to the dangers incident to the distillation of alcoholic products (R. 81). In addition, the petitioner offered testimony by Professor Morris to the effect that the use of gasoline as fuel was considerably *more hazardous* than the use of natural gas (R. 135-6); but upon the objections of the respondent, such testimony was excluded by the trial court. If it was incumbent upon the petitioner to show that Varisca's occupancy of the Bachmann Building was "more hazardous" than Huff's, then this testimony was clearly competent and admissible, and petitioner is entitled to the benefit thereof on this appeal (see *Truschel v. Rex Amusement Co.*, 102 W. Va. 215).

Unfortunately for respondent, it has been consistently held by the courts that the occupancy of an insured building for the purpose of manufacturing moonshine liquor, and the presence on the insured premises of moonshine stills and the usual equipment and materials used in connection therewith, create an *increased fire hazard thereto.* In *Miller v. Union Assurance Society*, 39 Fed. (2nd) 25, at page 29, the Circuit Court of Appeals for the Eighth Circuit said:

> "It was provided by the policy that it should become void (a) 'if the hazard be increased by any means within the control or knowledge of the insured'. *This provision stands alone and separate from the other provisions of the policy.* According to the evidence, the hazard was greatly increased by means which were within the knowledge and con-

trol of the insured. *Large quantities of gasoline were kept and stored in said premises for use in connection with the illegal manufacture of alcohol.* Moreover, according to the evidence, alcohol itself is an explosive substance. *It would be idle to say that the hazard of said premises was not increased by the installation and operation of distilling apparatuses in accordance with the methods and means shown to have been employed in this case. All the evidence points conclusively to that fact."* (Italics ours).

In such a situation, it is not a question for the jury whether the occupancy was "more hazardous"; the courts hold that the hazard is thereby increased *as a matter of law.* In *Taverna v. Palatine Insurance Co.,* 238 N. Y. S. 389, the New York Court said at page 391:

"While, as a general rule, the question of whether a risk or hazard has been increased is one of fact, there are conditions and situations which make it a question for the court rather than the jury. *We think that, under the facts in this case, the learned court below was correct in holding that, as a matter of law, the setting up of the stills and the storing of the alcohol in the building increased the hazard."* (Italics ours).

In the very recent case of *Schaffer v. Hampton Insurance Co.,* 235 N. W. 618, the Supreme Court of Minnesota said:

"The first question was submitted to the jury as the only issue in the case; the charge being that, if they found that the installation and operation of the distilling apparatus increased the fire risk, it avoided the policy, and entitled defendant to a verdict. *Defendant contends that, as a matter of law, the risk was increased.* Ordinarily, the question is

for a jury. But the evidence here is uncontradicted that an illicit distillery was carried on in the Westerly barn * * * *we are compelled to hold that the installation and operation of a still in a farm barn not located or constructed with a view safely to carry on such business exposes the premises insured to increased risk from fire.*" (Italics ours).

In a supplemental opinion on a rehearing of the case, reported in 236 N. W. 327, the Minnesota Court said:

> "Defendant proved conclusively that a still was operated in the smaller barn, and *we held, and still hold, that such operation as a matter of law increased the risk from fire.*" (Italics ours).

The same conclusion was reached by the Supreme Court of Appeals of West Virginia in the very recent case of *Whitlatch v. Mutual Fire Insurance Co.*, decided on October 13, 1931. As the opinion of the West Virginia court is not yet available in the reports, it is copied in *Appendix A* to this brief.

In the *Whitlatch Case*, the insured had been using natural gas in a secret compartment adjoining his barn for the purpose of heating a moonshine still. The West Virginia court said, in part, as follows:

> "Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, *we must nevertheless hold, as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose Slat made of the room.*" (Italics ours).

Nor is this all. If Varisca's occupancy of the Bachmann Building was not "more hazardous" than Huff's *as a matter of law*, as we conceive it to have been under

the authorities above cited, then the question was one of *fact* for the jury. In such event, it would be the duty of the District Court to charge the jury that it should return a verdict for the petitioner, if it believed that the use of the insured building by Varisca was "more hazardous" than Huff's use thereof. *This the District Court did not do.* As we have seen, the only question submitted to the jury by the District Court was whether respondent had "control or knowledge" of Varisca's use of the building (as typical of the charge, see Plaintiff's Instructions Nos. 4 and 10, R. 144, 147). Respondent is, therefore, in no position to complain that the petitioner did not prove a "more hazardous" use of the insured building or of the gasoline found thereon, when she herself, in her own instructions incorporated in the District Court's charge, did not submit this question to the jury.

Consequently, whether the language of the permit was, as petitioner contends, merely to allow the use of gasoline on the premises for "other *Mercantile* purposes not more hazardous," or, as respondent argues, for "other occupancies not more hazardous," the fact remains that Varisca's use of gasoline in the Bachmann Building to operate his moonshine stills *was not within the terms of the "permit" at all;* and this whole case can be summarized as follows:

1. The policy contains a warranty expressly prohibiting the storage or use of gasoline in the Bachmann Building.

2. This warranty is modified by a "rider" or "permit", the effect of which is to allow the use of gasoline in the building for certain specific purposes.

3. The use being made of gasoline in the Bachmann Building by the tenant Varisca at the time of

the fire—*i. e.*, to operate his moonshine stills—was not within the terms of the "permit."

We submit, therefore, that this case falls squarely within the decisions of this Court in the *Gunther Cases*, to a discussion and analysis of which we now advert.

IV.

The Use of Gasoline to Operate Moonshine Stills Not Being Within the Terms of the "Permit" on Respondent's Policy, the Decision of the Circuit Court of Appeals for the Fourth Circuit Is in Direct Conflict With the Decisions of This Court in Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool & London & Globe Insurance Co., 134 U. S. 110.

The recognized leading cases upon the subject of the construction and effect of a Prohibited Articles Warranty in a fire insurance policy, and the effect of a rider or "permit" modifying such warranty, are *Liverpool & London & Globe Insurance Co. v. Gunther*, 116 U. S. 113, and *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110. Both of these decisions were handed down in the same cause, which was twice appealed to this Court.

The judgment recovered by Gunther upon his fire insurance policy in the first trial of the case was reversed by this Court in December, 1885 (116 U. S. 113). Upon the second trial, a verdict was returned for the plaintiff, but this was set aside by the trial court (34 Fed. 501). Upon the third trial, the lower court directed a verdict in favor of the Insurance Company, and the judgment was affirmed by this Court in March, 1890, upon the second appeal (134 U. S. 110).

The Facts in the Gunther Cases.

In order to demonstrate the applicability of these two decisions to the present case, we shall briefly state the facts as they are related in the two opinions of this court.

The policy issued to Gunther described the insured building and the occupancy thereof as follows:

> "The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

A Prohibited Articles Warranty in the following language was contained in the policy:

> "Petroleum * * * benzine * * * naphtha * * * gasoline * * * or any other inflammable liquid are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * * otherwise this policy shall be null and void." (134 U. S. at 111).

The above warranty was modified by the following "permit" on the policy:

> "Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

The insured property, a hotel building, was owned by Gunther, but at the time of the fire, which occurred in August, 1879, was being occupied by a tenant, one Walker. For a period of about eleven years, gasoline

had been used in the gasometer described in the permit for the purpose of furnishing light for the hotel building, but the use of this apparatus had been discontinued in the Fall of 1878, about a year prior to the fire. Evidence was adduced at the trial tending to show that at the time of the fire gasoline was being kept by the tenant Walker in the oil room of the hotel *for some purpose other than the operation of the gasometer.* As to the particular use being made of this gasoline by the tenant, Mr. Justice Matthews said (116 U. S. 118):

> "There was evidence tending to show that gasoline, benzine or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic."

Gunther had no knowledge whatsoever of the gasoline being kept by his tenant.

The Rulings of Law in the Gunther Cases.

The following two important principles of law relating to the interpretation and effect of Prohibited Articles Warranties in fire insurance policies were laid down by this Court in the *Gunther Cases*:

(a) *That where a prohibited article, such as gasoline, is kept or used upon insured premises by a tenant in violation of a Prohibited Articles Warranty in the policy, the contract is forfeited, irrespective of whether the owner of the property had "control or knowledge" of the tenant's violation.* On the first appeal this Court said, in part, at pages 128-9 of 116 U. S.:—

> *"A violation of these prohibitions by anyone permitted by the assured to occupy the premises is a violation by the assured himself.* The Company stipulates that it will not assume the risks arising

from the presence of the articles prohibited; and if they are brought on the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the Company has refused to accept * * * *the insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another, the latter became his representative, for whom he must answer as for himself.*" (Italics ours).

And on the second appeal, Mr. Justice Gray, in delivering the opinion of this Court, said in part as follows, at pages 115-116 of 134 U. S.:—

"It has also been decided that a breach of the conditions by any person permitted by the assured to occupy the premises was equivalent to a breach by the assured himself; and that the assured was chargeable with any acts of his lessee in keeping upon the premises any of the prohibited articles, although they were not intended to be used there, but for lighting other places."

(b) *That a rider or "permit" on the policy, giving permission to use a prohibited article on the premises for a certain specific purpose, does not allow its keeping or use either generally, or for an entirely different purpose.*

Upon the first appeal, Mr. Justice Matthews, speaking for this court, said at pages 130 and 131 of 116 U. S.:

"The circuit court also erred in the charge to the jury that under the circumstances disclosed by the evidence it was no breach of the conditions of the policy to have in the oil room a quantity of

gasoline although not intended for use in the gas apparatus, the use of which had in fact been discontinued if the oil room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

"* * * it is clear that the privilege indorsed on the policy, in the following terms: 'To use gasoline gas—gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process', *did not sanction the keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for actual use in that gas apparatus.* There is no express permission to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. *Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privelege granted.* * * *"

"It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and in doing so would have been justified in obtaining, keeping, storing and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. *But if the privilege itself is not actually exercised, no such implication arises and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually ex-*

ercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time." (Italics ours).

And we quote from the opinion delivered by Mr. Justice Gray on the second appeal (134 U. S., at page 115):

"The clause following the description of the buildings in each policy, 'Privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process', does not affect the case; *for the use of the gas apparatus had been discontinued some time before the fire; and, as has already been decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus.* 116 U. S. 130 (29:581)." (Italics ours).

In order that the conflict between the decisions in the *Gunther Cases* and the opinion of the majority of the Circuit Court of Appeals in the present case may be clearly visualized and understood, we have undertaken to make below a detailed comparison thereof, in opposite columns:

Comparison Between Facts and Rulings of Law in Gunther and Bachmann Cases.

GUNTHER CASES	BACHMANN CASE
1. *Prohibited Articles Warranty*:	1. *Prohibited Articles Warranty*:
"Petroleum * * * gasoline * * * or any other inflammable liquid are not	"Unless otherwise provided by agreement in writing added hereto, this

to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy * * *; otherwise this policy shall be null and void." (134 U. S. at 111.)

Company shall not be liable for loss or damage occurring * * * (d) while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises * * * gasoline * * *" (R. 6-7).

2. *The Occupancy Clause*:

"The two-story frame hotel building, with one-story frame kitchen, and two-story frame pavilion adjoining and communicating, situate on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel)." (134 U. S. at 111).

2. *The Occupancy Clause, as Amended by Rider*:

"$4,000.00 on three-story brick building, with approved roof, and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous." (R. 3).

3. *The Gasoline Permit*:

"Privilege to use gasoline gas, gasometer, blower and generator, being under ground about sixty feet from main building in vault, no heat employed in process." (134 U. S. at 111).

3. *The Gasoline Permit*:

(being the composite result of the amended Occupancy Clause embraced in the rider and the Work and Materials Clause as interpreted by the Handbook of Rules): "Occupied for bottling

Automobile Oils, Offices and other Mercantile purposes not more hazardous; gasoline and such other materials as are prohibited by the printed conditions of the policy permitted *when kept and used for such purposes as are usual to the occupancies permitted.*"

4. *Use of Gasoline when Permit Attached.*

At the time the permit was placed on the policy, gasoline was being used in the gasometer apparatus for the purpose of lighting the insured building.

4. *Use of Gasoline when Permit Attached.*

At the time of the attachment of the rider or permit, small quantities of gasoline were being used by the tenant Huff as an ingredient in the manufacture of automobile oils.

5. *Use of Gasoline at Time of Fire.*

The gasoline stored in the oil room of the insured hotel at the time of the fire was not being used in connection with the gasometer apparatus mentioned in the permit, but either in torches for lighting a pavilion or for lighting certain picnic grounds some

5. *Use of Gasoline at Time of Fire.*

The gasoline found in the Bachmann Building at the time of the fire was being used by the tenant Varisca to operate three large moonshine stills.

distance away. (See 116 U. S. 118).

6. *Owner's Control or Knowledge of Gasoline.*

Gunther, the owner of the property, had no knowledge that his tenant, Walker, was keeping the gasoline on the premises.

7. *Holding of this Court.*

(a) That the permit did not eliminate gasoline from the Prohibited Articles Warranty, unless it was being used for the purpose specified in the permit. This court said, in part (116 U. S. 131):

"If the privilege itself is not actually exercised, no such implication arises; and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor in-

6. *Owner's Control or Knowledge of Gasoline.*

The Jury found that respondent had no knowledge of the gasoline being kept on the premises by her tenant Varisca.

7. *Holding of majority of Circuit Court of Appeals.*

(a) That the rider, being construed as a "permit", eliminated gasoline altogether from the Prohibited Articles Warranty, irrespective of the use being made thereof. We quote from the majority opinion:

"It was contended on the trial below that *this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles Warranty* * * *. The trial court took this view of the case, and we think prop-

tended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline in any quantity, in any place, or for any time." (Italics ours).

erly so." (Italics ours). (R. 179).

(b) That Gunther was bound by the act of his tenant in keeping gasoline upon the premises, for a purpose not included within the permit, irrespective of whether Gunther had control or knowledge thereof. This court said, in part (116 U. S. 129):

"The insured engaged that the prohibited thing should not be done; and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself." (Italics ours).

(b) That after the rider or "permit" was attached, gasoline came under the Increase of Hazard Warranty—that is, the tenant might keep or use gasoline upon the premises for any purpose, provided respondent had no knowledge or control thereof. (R. 179).

We submit that this graphic comparison plainly demonstrates that the majority opinion in the *Bachmann Case* is absolutely in conflict with the principles laid down by this court in the *Gunther Cases.*

V.

The Circuit Court of Appeals, in Approving the District Court's Charge Dealing With the Prohibited Articles Warranty, Erroneously Applied the Rule of Strict Construction to Respondent's Policy and the "Rider" Thereon, Contrary to Decisions of this Court.

In the first part of its opinion dealing with the portion of the District Court's charge which submitted to the jury petitioner's defense under the Increase of Hazard Warranty, the Circuit Court of Appeals cited the well-established rule that where there is any ambiguity or doubt in the meaning of an insurance policy, the contract will be construed most strongly against the Insurance Company (R. 178). It is apparent that in construing the "rider" as a general gasoline "permit," the Circuit Court of Appeals must have applied the same rule of strict construction.

The propriety of the application of the rule of strict construction to an insurance contract, where the facts warrant the invoking of such rule, is unquestioned. In the present case, however, as we have seen, respondent's policy contained in the Prohibited Articles Warranty an *absolute* prohibition against the keeping or using of gasoline in the insured building. By the "rider," this Warranty was modified only to the extent of the following language:

> "Occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous. (R. 3).
>
> *"Gasoline and such other materials as are prohibited by the printed provisions of the policy are permitted when kept and used for such purposes as are usual to the occupancies permitted."* (R. 89).

This language admits of no doubt or ambiguity. The right to store or use gasoline is limited to certain definite purposes. The Circuit Court of Appeals, in attempting to uphold the District Court's charge, was therefore not justified in invoking a rule of construction which this Court has held must not be applied where the language of the contract is "clear and unambiguous."

In the leading case of *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, Mr. Justice Jackson, speaking for this Court, stated the rule as follows at page 462 of the opinion:

> "It is settled * * * that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured. *But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.*" (Italics ours).

The rule of construction thus laid down has been consistently followed and applied by both the Federal and State Courts. The foregoing statement of the rule by Mr. Justice Jackson was recently quoted again with approval by this Court in *United States Fidelity & Guaranty Co. v. Guenther*, 281 U. S. 34, at p. 37.

There could be cited here an endless number of cases, both Federal and State, in which the same rule of construction for insurance contracts has been approved

and applied, but in view of the pronouncements of this Court upon the subject, we deem it unnecessary to prolong this brief with such citations.

It is submitted, therefore, that in construing the "rider" attached to respondent's policy, both the District Court and the Circuit Court of Appeals adopted the wrong method of approach; and that in the light of the "clear and unambiguous" language of the "rider," there was no place here for the application of the rule of strict construction.

VI.

Aside From the Decisions of This Court, the Construction of the "Rider" as a General Gasoline "Permit" by the District Court and the Circuit Court of Appeals is Contrary to Both Federal and State Court Decisions Involving Essentially the Same Facts.

We have attempted to demonstrate that the decision of the Circuit Court of Appeals is in direct conflict with the *Gunther Cases* decided by this Court. The same conflict exists with various Federal and State Court decisions, to some of which we shall briefly refer.

(a) *Whitlatch v. Mutual Fire Insurance Co.,* (decided by the Supreme Court of Appeals of West Virginia on October 13, 1931).

As this very recent case is not yet available in the reports, we have copied the opinion of the West Virginia court in *Appendix A* to this brief.

In the *Whitlatch Case,* the insured had constructed a secret compartment enclosed by solid concrete walls, adjacent to the foundation of his barn. In this compartment the insured had equipment and materials which quite obviously made up a moonshine still plant.

The still was heated by natural gas, through a hot plate. A gas explosion originating within the compartment completely wrecking it, killed the insured, and started a fire which destroyed the barn. The policy of insurance sued upon insured both the barn and a nearby dwelling house.

The policy contained the standard Increase of Hazard Warranty and an additional provision, analogous to a Prohibited Articles Warranty, which absolutely prohibited "the use of fire heat" in or about the barn. The Insurance Company contended that the policy was forfeited because the operation of a moonshine still plant by natural gas constituted an increase of hazard *as a matter of law*. On the other hand, the plaintiff contended that since the explosion and fire resulted from the use of natural gas within the compartment, the policy was not forfeited, it being asserted by the plaintiff that the Increase of Hazard Warranty and the additional warranty prohibiting "fire heat" had been eliminated or modified, in so far as natural gas was concerned, by the following "permit" which was attached to the policy:

> "Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions: This Company will not be liable for damages by explosion of Natural Gas on the premises unless fire ensues, and then for damages by fire only. CAUTION: The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stovepipe provided with dampers to prevent overheating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose

key to be hung up out of reach of children. BEWARE OF LEAKS IN PIPES." (See Appendix A).

The Supreme Court of Appeals of West Virginia refused to construe the natural gas permit as contended for by the plaintiff, and in its opinion *referred to the decision of this Court in Liverpool & London & Globe Insurance Co. v. Gunther,* 116 U. S. 113. We quote from the opinion of the West Virginia Court:

> "The defendant replies that the use of gas allowed by the permit was use in the "accustomed manner" with the usual safeguard and not a use which is extraordinary, citing *Ins. Co. v. Gunther,* 116 U. S. 113, 130-1; and defendant contends that the character of the articles found in the room in connection with its inaccessibility and its secrecy, demonstrate that Slat was using it to manufacture moonshine liquor. * * * The facts that the room had no ventilation, and that gas was being conducted through the rubber hose (with its natural tendency to leakage) *show a use which was unusual and not contemplated by the insurer in granting the gas permit. Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, we must nevertheless hold as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose Slat made of the room;* and that an instruction to find for defendant (requested) should have been given." (See Appendix A). (Italics ours).

(b) *Miller v. Union Assurance Society, 39 Fed. (2nd) 25.*

Here, the Circuit Court of Appeals for the Eighth Circuit had before it a case very similar to the present

one on the facts. An Italian tenant of the policyholder was, at the time of the fire, storing and using gasoline on the insured premises for the purpose of operating his moonshine stills. The Circuit Court of Appeals held that the tenant's act violated the Prohibited Articles Warranty and forfeited the policy. We quote from page 29 of the opinion:

> "It was further provided that said policies should become void 'if there be kept, used or allowed' on said premises gasoline or other explosives. Undeniably large quantities of gasoline and alcohol were kept and used on said premises by Armeno. Such articles were used in connection with the unlawful manufacture of alcoholic spirits. This was a violation of the contracts and warranted the appellee in declaring them void. *La Force v. Williams City Ins. Co.*, 43 Mos. App. 519; *Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575; *Gunther v. Liverpool & London & Globe Insurance Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857; *Leonard v. Northwestern Nat. Ins. Co.*, 53 App. D. C. 343, 290 F. 318."

It was contended in the *Miller case*, as respondent does here, that the Work and Materials Clause in the policy permitted the storage and use of gasoline on the insured premises. The Work and Materials Clause in Miller's policy gave him the right to use the premises, "as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law" (see 39 Fed. (2nd), at page 30).

The "business conducted therein" at the time Miller's policy was written was "the manufacture of water fillers, oil burners, ice can fillers, and other small appliances" (see 39 Fed. (2nd), at page 29).

Bearing in mind that the rider or "permit" was attached to respondent's policy when the Bachmann Building was being used by the former tenant Huff for the legitimate manufacture of automobile oils, the following extracts from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* are peculiarly pertinent to the case at bar:

> "It is contended by the appellant that the policies themselves contain no provision relative to the use of said premises. When the policies were written, the premises were occupied by the E. L. Miller Manufacturing Company. This company was engaged in the manufacture of water fillers, oil burners, ice can fillers, and other small appliances. Both parties knew the nature and hazards of this occupancy. It was unnecessary to stipulate in the contract the nature of the occupancy and the hazards thereof when both were well known to the contracting parties." (39 Fed. (2nd), p. 29).
>
> "Neither can the storing and use of gasoline and alcohol on said premises be excused or justified under the so-called work and materials clause of the policies. This provision reserves to the occupant the right to use 'the premises as is usual and incidental in the business * * * as conducted therein * * * when not in violation of any law'.
>
> "Obviously and admittedly the materials in question were used in violation of law as the premises were being used not only to violate the prohibitory laws of the government but the revenue laws as well." (39 Fed. (2nd) p. 30).

While the Work and Materials Clause in respondent's policy did not contain the words "when not in violation of any law", it did embody, as we have seen, a limitation no less plain and definite, i. e., that the gaso-

line used on the premises must be "kept and used for such purposes as are usual to the occupancies permitted" (R. 89). It seems obvious, therefore, that the decisions of the Circuit Court of Appeals for the Eighth Circuit in the *Miller case* and of the Circuit Court of Appeals for the Fourth Circuit in the *Bachmann case*, involving substantially the same set of facts, are in hopeless conflict.

(c) *Jacksonville Adjustment Bureau v. National Ben Franklin Insurance Co., 1 Fed. (2nd) 800.*

In this case, it appeared that fireworks were being kept in the insured building at the time of the fire. The standard Prohibited Articles Warranty contains the same prohibition against fireworks as it does against gasoline (R. 7). The insured sought to have fireworks eliminated from the Prohibited Articles Warranty, because gunpowder was permitted by the policy to be kept on the premises, and it was shown that the fireworks were made of gunpowder. But the Court (Southern District of Florida) dealt with this argument as follows, at page 801:—

> "The fifth replication undertakes to justify the keeping of fireworks because the policy permitted gunpowder to be kept in stock. *The policy contains the absolute inhibition against keeping fireworks in stock; and, as announced by the Supreme Court, insurance policies are construed like any other written contract between parties. If the meaning of the words used is plain, and no fraud or mistake in the case, there is no room for construction. They must be given their plain meaning.* Fireworks are prohibited; gunpowder is allowed. It will not do to say that, because fireworks have

gunpowder in them, fireworks may be kept in stock where the policy forbids it." (Italics ours).

It was further contended by the insured that the occupancy clause of the policy should be construed so as to permit the keeping of fireworks, notwithstanding the Prohibited Articles Warranty, but the court replied to that argument thus, at page 801:

"The contention of plaintiff that the typewritten words in the policy, 'Dry goods, ready to wear clothing, boots, shoes, clothing, groceries, hardware', followed by the printed words, 'and such other merchandise not more hazardous usual to his trade', authorizes the keeping of fireworks, is not tenable. Nor can a custom of the trade be shown to contradict the provisions of the policy. There is no ambiguity to be explained."

(d) *Norwayss v. Thuringia Insurance Co.*, 204 Ill. 334.

In this case, the policy in question contained the standard Increase of Hazard and Prohibited Articles Warranties. There was also attached to the policy a rider containing a gasoline "permit" in the language following:

"Permission is hereby given for the use of gasoline stoves, the reservoir to be filled by daylight only and when the stove is not in use. Warranted by the assured that no artificial light be permitted in the room when the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons to be in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto." (See 204 Ill., 337).

The evidence showed that at the time of the fire, the insured's tenant was keeping a gallon can of gasoline in the pantry, in addition to the gasoline permitted by the rider to be contained in the reservoir in the stove. In holding that this constituted a violation of the Prohibited Articles Warranty, notwithstanding the "permit" on the policy, the Supreme Court of Illinois said at page 342:

> *"The permission given to the insured to use gasoline does not relieve him from the effect of the violation of the one important restriction on such use.* The insurance company was not compelled to give its permission to the appellant to use gasoline. It was a voluntary act for the benefit of the insured, and there was no advantage to the insurance company gained thereby. Contracts of insurance are to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer, and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having been made, is not actually or inferentially waived, it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion. *In the case at bar there was permission given to use a gasoline stove, and on the permit were the words, 'Warranted by the assured that no artificial lights be permitted in the room when the reservoir is being filled, and no gasoline except that contained in*

said reservoir shall be kept within the building.' The undisputed evidence is that gasoline was kept by the tenant of the insured in the building." (Italics ours).

And later, in the same opinion, at page 345, the Illinois Court said:

"If we were to consider this 'rider' as a contract, there is on one side a permission to use a gasoline stove; on the other side, standing as a consideration for the permission, a warranty that in using the stove no gasoline other than that in the reservoir shall be kept in the building."

(e) *Vandervolgen v. Manchester Fire Insurance Co.*, 123 Mich. 291.

The policy in this case contained a Prohibited Articles Warranty which forbade the keeping of kerosene oil on the insured premises in quantities exceeding five barrels, with the following proviso:

"Provided, it (the kerosene) be drawn and lamps filled by daylight, or at a distance of not less than ten feet from artificial light."

It appeared from the evidence that the insured had attempted to draw kerosene oil from the tank kept in the insured building in a manner different from that specified in the provision quoted above.

In denying a recovery on the policy, the Supreme Court of Michigan, speaking through Chief Justice Montgomery, said in part as follows at pages 293-295 of 123 Mich:

"Plaintiff contends that the clause in question by its terms applies when it is not otherwise provided by agreement indorsed on the policy, and that by the written portion of the policy it is made

to cover oils and such other goods as are usually kept in a hardware store, etc., and that this is a provision otherwise than in the written clause. * * * The defendants contend, however, that this line of cases does not meet the question here involved, for it is said the written portion of the policy itself permits the keeping and sale of kerosene, but that what is provided against is that kerosene shall be drawn in the nighttime within a specified distance from an artificial light; that this provision is entirely consistent with the fact that the insurance covers kerosene. This view seems entirely sound, and was sanctioned in *Gunther v. Insurance Co.* (C. C.) 34 Fed. 501. * * * By the parenthetic clause in this policy the use for lighting purposes or keeping for sale is not prohibited, but it is provided that the oil be drawn by daylight, or not less than 10 feet from artificial light. *This language is plain and unambiguous. We cannot doubt that it was intended to and should be construed as providing a forfeiture for the drawing of kerosene in any other manner than that provided.*" (Italics ours).

Many other cases might be cited, but we believe the foregoing discussion is sufficient to demonstrate that not only is the decision of the Circuit Court of Appeals, in construing the "rider" attached to respondent's policy as a "permit" allowing the use of gasoline generally, in direct conflict with decisions of this Court, but it is likewise out of harmony with the conclusions reached in many Federal and State cases in which the facts involved were essentially the same.

Conclusion.

From the clear and unambiguous language of respondent's policy and the "rider" attached thereto, from the undisputed extrinsic circumstances surrounding the addition of the "rider", and from the foregoing discussion of legal principles and authorities, we submit that the Circuit Court of Appeals erred in construing the "rider" as a general gasoline "permit" which eliminated this article entirely from the Prohibited Articles Warranty. In line with the principles laid down in the *Gunther Cases*, we submit that the District Court should have given to the jury, as was requested by petitioner at the trial (see R. 148-50), a simple and direct charge to the effect that if gasoline was being kept or used in the Bachmann Building by the tenant Varisca for the purpose of operating moonshine stills, the policy was forfeited, irrespective of respondent's "control or knowledge" thereof. As actually given, the District Court's charge deprived petitioner entirely of its defense under the Prohibited Articles Warranty, and in view of the overwhelming proof that the moonshine stills found in the Bachmann Building were being operated by gasoline, it is obvious that the petitioner has not had a fair trial.

It was pointed out in our petition for certiorari that this case does not involve merely a question of the correct interpretation of an isolated private contract; respondent's policy, and the Prohibited Articles Warranty contained therein, are in the same standard form required to be used by statute in a majority of the States. In at least twenty-five States, the so-called "New York Standard Policy" has been adopted by statute. A list of these States, together with a reference to their standard policy statutes, will be found in *Appendix B* to this brief. It is also common knowledge,

and we believe this Court can take judicial knowledge of the fact, that in practically all of the forty-eight States the "New York Standard Policy" is used in insuring property against loss by fire, whether actually prescribed by statute or not.

Since by statute and by custom the language of the Prohibited Articles Warranty in fire insurance policies has become standardized, and its use is so universal, a precedent should not now be set for the complete emasculation of the Warranty by a "rider" or "permit" which was never intended by the parties to have, and by its plain language does not have, such effect.

* * * * * * * *

For the foregoing reasons, it is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Northern District of West Virginia, should be reversed.

RUSSELL L. FURBEE;
PHILIP P. STEPTOE,
LOUIS A. JOHNSON,
JAMES M. GUIHER,
Counsel for Petitioner.

APPENDIX A.

The following opinion was handed down by the Supreme Court of Appeals of West Virginia on October 13, 1931:

L. N. Whitlatch, Admr.

v.

Mutual Fire Insurance Company of W. Va.

Marion County — Reversed and Remanded

HATCHER, Judge.

Permission in a fire insurance policy to use natural gas in a barn for light and fuel implies use of the gas in the customary way; and where the gas is used by the insured in a manner and under conditions which are unusual and which increased the hazard assumed by the insurer, such use avoids the policy under a warranty so providing.

HATCHER, Judge:

This is an action to recover insurance on a barn and farming implements destroyed by fire. The insurance company denied liability on the ground that the assured had violated certain warranties in the policy. The plaintiff obtained a judgment for $1,000 and the defendant secured a writ of error.

The following facts were established at the trial: Tom Slat held a three year policy issued May 26, 1926, by defendant which covered the loss. About 7 a. m. Sunday, January 22, 1928, the attention of his family and close neighbors was attracted to the barn by an explosion followed by a fire (which destroyed it). Hurrying to the fire they found his dead body in a covert chamber adjoining a foundation wall of the barn. This compartment was approximately 20x10x6, and con-

tained one entrance (only), through a trap door, two to three feet square in the wall of the barn. The floor, walls and ceiling of the room were constructed of concrete; the walls and ceiling were six inches thick (some witnesses said more) and the ceiling was reinforced with steel rails and cables. There was a pig pen above the structure. The explosion burst open the ceiling of the room and set fire to the pen and the barn. The compartment contained (a) a water line, (b) a gas line with an open burner, and a connection to which was attached a rubber hose about four feet long, (c) a gas hot plate made of ¾ inch piping ("run backward and forward" four or five times, into which holes had been drilled to permit the escape of gas), (d) a 20 gallon keg with a small round hole in the side near the bottom, and (e) a wooden tank with a capacity of four to five hundred gallons, which contained a mixture of cracked corn and water. Several members of Slat's family were witnesses and they denied any knowledge of the compartment. It was unknown to all his neighbors who testified, except one, who helped Slat construct part of it about 1920.

The warranties in the policy which the defendant claims were violated are as follows:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured * * * .
>
> The use of fire heat in any barn, * * * or other outbuilding insured or containing property insured by this policy, or exposing property insured hereby, without written permission hereon, renders this entire policy void."

The plaintiff contends that the gas was used in the secret room for fuel and light and such use was permissible, under the following permit in writing attached to the policy:

> "Permission is hereby granted for the use of Natural Gas for fuel and light, subject to the following conditions: This Company will not be liable for damages by explosion of Natural Gas on the premises unless fire ensues, and then for damages by fire only. CAUTION: The heat from Natural Gas being more intense than that derived from wood or coal, property owners should see to it that all stoves have under and around them the proper zinc or other metal protection, and stovepipe provided with darapers to prevent overheating pipes and flues. On all stove attachments the stopcock should have a shield to indicate when open or closed, and a loose key to be hung up out of reach of children. BEWARE OF LEAKS IN PIPES."

The defendant replies that the use of gas allowed by the permit was use in the "accustomed manner" with the usual safeguard and not a use which is extraordinary, citing *Ins. Co. v. Gunther*, 116 U. S. 113, 130-1; and the defendant contends that the character of the articles found in the room in connection with its inaccessibility and its secrecy, demonstrate that Slat was using it to manufacture moonshine liquor. The plaintiff answers that the contention fails because no boiler and coil were found, both of which are necessary in such an operation. The facts that the room had no ventilation, and that gas was being conducted through the rubber hose (with its natural tendency to leakage) show a use which was unusual and not contemplated by the insurer in granting the gas permit. Even if we close our eyes to the obvious inference to be drawn from the character of the articles in the room, we must nevertheless hold

as a matter of law, that use of gas under such extraordinary conditions increased the hazard assumed by the insurer, no matter what purpose that made of the room; and that an instruction to find for defendant (requested) should have been given. See generally *Appleby v. Ins. Co.*, 54 N. Y. 253; *Schaffer v. Ins. Co.*, (Minn.) 235 N. W. 618. This determination renders a discussion of other points of error unnecessary.

The judgment of the lower court is reversed, the verdict of the jury set aside, and the case remanded.

Reversed and Remanded.

APPENDIX B.

In the States listed below, the New York Standard Fire Insurance Policy has been adopted by statute:

Arizona, Laws of 1913, Ch. 94, Sec. 56;
California, Laws of 1909, p. 404;
Connecticut, Revised Laws of 1918, Ch. 210, Sec. 4075;
Idaho, Laws of 1913, Ch. 185, Sec. 13;
Iowa, Code of 1927, Secs. 9017 and 9018;
Louisiana, Laws of 1914, p. 493;
Maine, Revised Statutes, Ch. 49, Sec. 4;
Massachusetts, General Laws of 1921, Ch. 175, Sec. 99;
Michigan, Laws of 1917, No. 256, Sec. 243;
Minnesota, Laws of 1923, Ch. 410;
Nebraska, Revised Statutes of 1913, Sec. 3237;
New Hampshire, Pub. Statutes, Ch. 170, Sec. 1;
New Jersey, P. L. of 1902, p. 437;
New Mexico, Laws of 1925, Ch. 135, Sec. 66;
New York, Laws of 1922, Ch. 268;

North Carolina, Laws of 1915, Ch. 109, Secs. 9 and 10;
Oklahoma, Laws of 1909, pp. 348 to 350;
Oregon, Laws of 1917, Ch. 203, Sec. 22-H;
Pennsylvania, Laws of 1915, P. L. 919, Secs. 1 and 2;
Rhode Island, P. L. 1921, Ch. 2094;
South Dakota, Laws of 1909, Ch. 164, Secs. 1 and 2;
Virginia, Laws of 1928, pp. 763-766;
Washington, Laws of 1915, p. 598, Sec. 12;
West Virginia, Laws of 1923, Ch. 18;
Wisconsin, Laws of 1923, Ch. 291, Sec. 3.

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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 311.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,
a Corporation, Petitioner,

v.

SOPHIA C. BACHMANN, Respondent.

REPLY BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

RUSSELL L. FURBEE,
Fairmont, W. Va.
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INDEX TO REPLY BRIEF.

	PAGE
Introductory Statement	1
Argument	3
I. Petitioner's specification of defense under the Prohibited Articles Warranty was in proper form to raise the important question now under discussion—that is, whether or not petitioner was required to prove that the keeping of a prohibited article on the premises was "within the control or knowledge" of the respondent; and it was so regarded by both the District Court and the Circuit Court of Appeals	3
II. The respondent's own interpretation of the modification made in the Prohibited Articles Warranty by the "rider" condemns the District Court's charge as erroneous	15
III. The case of Whitlatch v. Mutual Fire Insurance Company	20

Table of Cases and Authorities Cited.

49 Corpus Juris, 787	8
Liverpool & London & Globe Insurance Co. v. Gunther, 116 U. S. 113	8
Lohr v. Wolfe, 71 W. Va. 627	6
Long v. Pocahontas Collieries Co., 83 W. Va. 380	6
21 Ruling Case Law, pages 452, 453	8
Wilson v. Phoenix Powder Co., 40 W. Va. 413	6
Vrendenburgh v. Bachmann, 11 Fed. (2nd) 473	7

Table of Statutes Cited.

West Virginia Code of 1923, Ch. 125, Sec. 64	3
West Virginia Code of 1923, Ch. 125, Sec. 66	4

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REPLY BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Introductory Statement.

In submitting this reply brief, it is not our intention to burden the court with a repetition of the argument and the citations of authorities contained in petitioner's original brief; nor shall we attempt to point out, by a critical analysis of respondent's brief, various assertions of fact and statements of law therein contained with which we can not agree. After all, this case presents just one simple question, namely, the proper interpretation of the Prohibited Articles Warranty in respondent's policy, after the addition of the so-called "rider" or "permit". It seems to us that there is a consistent effort throughout respondent's brief to dodge this simple issue, and to attempt to distract the attention of the court from it by continually referring to and discussing matters which are entirely beside the

point. However, we have complete confidence in the ability of this court to separate the wheat from the chaff, and to avoid being led off on a false scent by the argument of counsel.

The primary purpose of this brief is to reply to that portion of the respondent's brief which attempts to defend the District Court's charge (the jury having been instructed that it was incumbent upon petitioner to prove that the respondent had "control or knowledge" of the gasoline found in the Bachmann Building), on the theory that petitioner's defense under the Prohibited Articles Warranty had been narrowed or restricted by reason of certain averments contained in its specification of defense, although neither the District Court nor the Circuit Court of Appeals took this view of the case.

Argument.

I.

PETITIONER'S SPECIFICATION OF DEFENSE UNDER THE PROHIBITED ARTICLES WARRANTY WAS IN PROPER FORM TO RAISE THE IMPORTANT QUESTION NOW UNDER DISCUSSION — THAT IS, WHETHER OR NOT PETITIONER WAS REQUIRED TO PROVE THAT THE KEEPING OF A PROHIBITED ARTICLE ON THE PREMISES WAS "WITHIN THE CONTROL OR KNOWLEDGE" OF THE RESPONDENT; AND IT WAS SO REGARDED BY BOTH THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS.

About one-third of respondent's brief (see pages 9 to 28 of brief) is wholly devoted to the argument that it was proper for the District Court to charge the jury that "control or knowledge" of the gasoline by the respondent must be proven by the petitioner, because of an averment in petitioner's specification of defense under the Prohibited Articles Warranty that the keeping of prohibited articles on the premises was "well known" to the respondent. We submit that this argument will not stand analysis for various reasons.

(1) *The averment in petitioner's specification of defense that respondent had knowledge of the prohibited articles did not require proof thereof, if in fact "control or knowledge" on the part of the insured was not an essential element of the defense under the Prohibited Articles Warranty.*

Chapter 125, Section 64, of the West Virginia Code of 1923, relating to pleadings to be filed in insurance cases, provides as follows:

> "If in any action on a policy of insurance, the defense be that the action cannot be maintained because of the failure to perform or comply with,

or violation of any clause, condition or warranty in, upon or annexed to the policy, or contained in or upon any paper which is made by reference a part of the policy, the defendant *must file a statement in writing specifying by reference thereto, or otherwise the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred.*" (Italics ours.)

Chapter 125, Section 66, of the West Virginia Code of 1923, provides:

"But no statement which, in the particulars required by or under the said sections to be stated or referred to therein, is *sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him, shall be adjudged insufficient.*" (Italics ours.)

Pursuant to these statutes, petitioner filed in the District Court, as one of its specifications of defense, the following:

"The following condition and warranty is also found in said policy:

'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, *gasoline,* naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels.'

> The defendant says that at the time of the fire complained of, and prior thereto, *large quantities of gasoline,* explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and *was in violation of the foregoing condition and warranty."* (R. 13-14.) (Italics ours.)

Thus the petitioner, after quoting the Prohibited Articles Warranty, alleged that two of the prohibited articles, namely, *gasoline* and *explosives,* were being kept in the Bachmann Building "in violation of the foregoing condition and warranty".

The respondent filed a reply to this specification of defense, alleging that the "rider" or "permit" attached to the policy eliminated the prohibition against the keeping of gasoline (R. 16-17).

Throughout her brief, respondent argues that because petitioner's specification of defense quoted above included a recital to the effect that the keeping of gasoline in the Bachmann Building was "well known" to the respondent or her agents, petitioner can not now establish a breach of the Prohibited Articles Warranty without proving that such breach was "well known" to the respondent, *notwithstanding the well-established rule, universally recognized by the authorities as shown in our original brief, that under the standard Prohibited Articles Warranty knowledge or control of a prohibited article on the part of the insured is not required to be proven.*

The contention which respondent thus advances is so obviously unfounded that a reply seems hardly necessary. However, since the proposition is so con-

stantly referred to throughout respondent's brief, a discussion of it would seem to be justified.

The question raised may be briefly summarized as follows: A defendant pleads certain facts which constitute a defense to the plaintiff's claim. The plea also alleges that the plaintiff *had knowledge of such facts.* As a matter of law, however, proof of plaintiff's knowledge is not essential to the defense pleaded; in other words, the plea is sufficient without it. In such a case, *must the defendant prove the fact of knowledge, which is alleged, but is not an essential element of the defense?*

The query presents no real difficulty. It is uniformly held in West Virginia and elsewhere that *any unnecessary averment of a pleading will be treated as mere surplusage.*

In *Wilson v. Phoenix Powder Company,* 40 W. Va. 413, syllabus No. 2 is as follows:

> "Allegations of fact not necessary to maintain an action or defense are immaterial and surplusage, and need not be proven."

In *Lohr v. Wolfe,* 71 W. Va. 627, point 2 of the syllabus reads as follows:

> "If other facts not necessary to maintain the action or defense be alleged, such facts may be treated as surplusage and need not be proven."

In *Long v. Pocahontas Collieries Company,* 83 W. Va. 380, point 2 of the syllabus is as follows:

> "Where the declaration or other pleading states a good cause of action, but broader than the contract or other liability proven, objection to the evidence or motion to exclude based on variance, not specifically stated to be on that ground, should

after verdict be treated as waived and be disregarded."

The decision of the Circuit Court of Appeals for the Fifth Circuit in *Vrendenburgh v. Bachmann,* 11 Fed. (2nd) 473, is squarely in point. There, the plaintiffs had sued in a District Court in Texas to recover damages because of alleged fraudulent representations made by the defendants in connection with a certain real estate deal. The plaintiffs' complaint alleged that the defendants *knew the representations were false* at the time they were made. A Texas statute provided that in real estate transactions, a party making false representations should be liable for damages, *irrespective of his knowledge of the falsity of his statements.* The District Court charged the jury, as appears at page 473 of the opinion, as follows:

> "The plaintiffs were not entitled to recover unless the representations alleged and deposed to were known to be false at the time they were made, and were made with the intent and purpose of deceiving the parties to whom they were made."

The Circuit Court of Appeals for the Fifth Circuit reversed the judgment for the defendants rendered below. We quote from page 474 of the opinion:

> "The above mentioned instructions are not sustainable because the petition contained allegations to the effect that defendants knew that the stated representations were not true. *Those allegations were not of a fact which was essential to the cause of action asserted. The right of the plaintiffs to recover was not dependent upon their proving immaterial or superfluous allegations."* (Italics ours.)

The following is quoted from *21 Ruling Case Law,* pages 452 and 453:

> "Surplusage consists in alleging facts other than those necessary to the sufficiency of the pleading. While surplusage may be rejected, and need not be proved, it is a well established rule that its presence in a pleading will not vitiate it."
>
> "If a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts on which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded."

And the rule is stated as follows in *49 Corpus Juris,* at page 787:

> "As a general rule *no more need be proved, even though more be alleged, than enough to sustain the cause of action or defense relied upon.* In other words only those allegations necessary to a recovery need be supported by proof. Surplusage in a pleading need not be proved." (Italics ours.)

This court itself has held that an incomplete, uncertain, or inartistically drawn answer or specification of defense will not deprive an insurance company of a defense under the Prohibited Articles Warranty which has been fully established by the evidence adduced at the trial. We quote from pages 126 and 127 of the opinion in *Liverpool & London & Globe Insurance Company v. Gunther,* 116 U. S. 113, a case frequently referred to in our original brief:

> "It is true that the answer does not specifically set out as part of the defense that kerosene was kept on the premises to be used for lights, but that, in breach of the condition which permitted such use,

it was drawn after dark and with a lighted lamp near; but the right to keep it and use it in the manner specified in the condition is an exemption from the general prohibition, which forbids the mere keeping of it without written permission; so that, strictly speaking, *an averment that the article was kept and used on the premises, in violation of the condition, includes the use of it, otherwise than for lights, and the drawing of it otherwise than by daylight. Under the allegations of the answer, although not so definite and certain as might have been required, upon motion made in due time, it seems to us it was competent for the defendant to prove and rely upon any keeping and use of burning fluid prohibited by the conditions set out.*

Whatever obscurity there was in pleading the defense, considered apart from the facts subsequently disclosed in evidence, nevertheless, all the testimony necessary to its establishment was offered and admitted without objection. It was offered and admitted as tending to prove that there had been a breach of the conditions of the policy; and the whole matter of the defense was covered by the testimony, on examination and cross examination of the witnesses, both on the part of the defendant in chief and on that of the plaintiff in rebuttal. On the conclusion of the testimony on both sides the matter now insisted on was specially called to the attention of the court by a request on the part of the defendant's counsel to direct a verdict for the defendant on that ground alone, when, if it was a matter of surprise to the opposite party, opportunity for meeting it might still have been given; or if the pleadings were considered not to be sufficiently explicit, an amendment might have been required and made. *The request was re-*

fused, and it does not appear from the record to have been on the ground that the defense was not within the issues; but the refusal was absolute and unqualified. We refer to it, not for the purpose of intimating that the court was bound to grant the request, but because we think the matter ought to have then been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. *By the course actually taken the defendant was deprived of the benefit of a defense, legitimately arising upon the evidence actually in the case,* admitted without objection." (Italics ours.)

The purpose which petitioner had in mind, in averring that respondent had knowledge of the presence of the gasoline in the Bachmann Building, is clear. Petitioner intended to prove such knowledge if it could, in order to make its case as strong as possible; and under the West Virginia statutes hereinbefore referred to evidence tending to establish such fact would not have been admissible or competent unless based upon some averment in the specification of defense. Under petitioner's specification, as filed, knowledge could be proven, but need not be proven. Respondent could certainly not be prejudiced by the addition of an unnecessary averment.

If petitioner had pleaded that gasoline alone was being kept in the Bachmann Building, in violation of the Prohibited Articles Warranty, and then had sought to prove that some other prohibited article was also found in the building, respondent might well complain. But we are unable to see how respondent can be heard to complain that petitioner may have fallen short of

proving an unnecessary averment in its specification of defense.

Under the theory advanced by respondent, in the event of any doubt as to whether "control or knowledge" on the part of the insured must be proven to establish a defense under the Prohibited Articles Warranty, petitioner would have had to file two separte specifications of defense — one of which would have alleged knowledge by respondent of the presence of the prohibited articles and the other of which would have been in the same form precisely, except for the omission of the averment as to knowledge. Fortunately, such duplication of pleading is not necessary under our practice. The defendant alleges all relevant facts which he believes he may be able to prove. He then proves what he can; but he need not prove all of the facts alleged, unless all are essential to his defense. The greater includes the less.

(2) *Respondent's present contention that petitioner's defense under the Prohibited Articles Warranty was narrowed or restricted by the averments of its specifications of defense was not accepted by either the District Court or the Circuit Court of Appeals.*

It seems self-evident to us that this entire argument is now advanced by the respondent in the desperate hope that this court may be induced to lose sight of the one important issue raised by the charge of the District Court and the decision of the Circuit Court of Appeals affirming it. The District Court and the Circuit Court of Appeals both held that petitioner must prove that the respondent had "control or knowledge" of the gasoline found in the Bachmann Building, *because they were of the opinion that the addition of the "rider" or "permit" to respondent's policy eliminated gasoline*

from the Prohibited Articles Warranty. Respondent now asks this court to disregard entirely the ground upon which the District Court and the Circuit Court of Appeals rested their decisions, and to affirm the judgment on a *question of pleading* in which neither of the courts below could see any merit.

We do not recall that, at the trial in the District Court, the respondent ever advanced the argument that petitioner's defense under the Prohibited Articles Warranty had been restricted by the allegations of its specifications of defense. But if such contention was made, certainly the District Court rejected it. The District Court was of the opinion that petitioner had the burden of proving that respondent had "control or knowledge" of the gasoline being kept in the insured building; but this ruling was based upon the belief that gasoline had been eliminated from the Prohibited Articles Warranty by the "rider" or "permit" attached to respondent's policy, and not because of any idea that petitioner's defense had been narrowed or restricted by the pleadings. There can be no doubt upon this subject, because fortunately the record shows the reason underlying the District Court's ruling. We quote from Plaintiff's Instruction No. 8, which was given by the District Court at the request of counsel for respondent:

> "You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since *the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities*

of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline." (R. 146.) (Italics ours.)

So much for the action of the District Court on this subject. Upon the appeal to the Circuit Court of Appeals, this same argument based upon the alleged restrictive effect of petitioner's pleading was advanced and discussed by respondent in her brief. Petitioner then filed a reply brief dealing with the same proposition: *The Circuit Court of Appeals wholly disregarded and rejected respondent's argument on the question of pleading and based its decision upon the same ground as had the District Court—namely, that petitioner had the burden of proving "control or knowledge" of the gasoline on the part of the respondent on the theory that gasoline had been entirely eliminated from the Prohibited Articles Warranty by the "rider" or "permit".* That the Circuit Court of Appeals found no merit in respondent's attack upon petitioner's specification of defense is apparent from the opinion, in which no mention was made of it. We quote the pertinent portion of the opinion of the Circuit Court of Appeals:

> "At the time of the inspection by the agent of the Insurance Company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the Insurance Company saw that gasoline was being stored in the building. *It was contended on the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the Prohibited Articles War-*

> *ranty,* and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the Increased Hazard Class. *The trial court took this view of the case, and we think properly so.* The agent of the Insurance Company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the Insurance Company must under the terms of the policy, as above discussed, bring such fact "within the knowledge and control" of the insured or her agent." (R. 179, 180.) (Italics ours.)

We are astounded to find in respondent's brief (see pages 26 and 27 of brief) the assertion that petitioner is attempting to prevail in this court on a different theory from that urged in the District Court and the Circuit Court of Appeals. The statement that the petitioner is now seeking to shift its ground of defense is rather amusing, since the fact is that the shoe is on the other foot. Respondent advances here the argument that the judgment complained of should be affirmed upon a ground entirely different from that on which both the District Court and the Circuit Court of Appeals based their decisions. Nor is this all. *The record shows that the respondent herself did not rely in the District Court upon this question of pleading, but upon the "rider" attached to her policy.* The District Court embodied in its charge *verbatim* a number of written instructions prepared by respondent's counsel (R. 140), including Plaintiff's Instruction No. 8, an extract from which has been hereinbefore quoted. Hence, the following language from Plaintiff's Instruction No.

8 represents a written memorial of what respondent's contention was in the trial court:

> "The defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on *is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises, since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline.*" (R. 146.) (Italics ours.)

In view of this change of face, it hardly lies in the mouth of the respondent to say anything about a shifting of positions or a changing of theories. It seems apparent that the respondent has lost confidence in the theory which she successfully urged upon both the District Court and the Circuit Court of Appeals (that is, that gasoline was eliminated from the Prohibited Articles Warranty by the "rider"), and now wants this court to affirm her judgment because of a supposed weakness in petitioner's pleading which neither of the courts below found to exist.

II.

THE RESPONDENT'S OWN INTERPRETATION OF THE MODIFICATION MADE IN THE PROHIBITED ARTICLES WARRANTY BY THE "RIDER" CONDEMNS THE DISTRICT COURT'S CHARGE AS ERRONEOUS.

In petitioner's original brief, we asserted (see brief, pages 38-39) that the only point of difference between the petitioner and the respondent, in their interpretation of the *language* of the so-called gasoline "permit", was whether the adjective *"Mercantile"* should be included. Petitioner's contention is that the "permit" allowed the use of gasoline for the following purposes only:

> "For bottling Automobile Oils, Offices, and other *Mercantile* purposes not more hazardous." (See petitioner's brief, pages 34-39).

The respondent's contention, as we then understood it, and as it is stated in petitioner's brief, was that the "permit" allowed gasoline on the premises for the following uses:

> "For bottling Automobile Oils, Offices, and other purposes not more hazardous." (See petitioner's brief, 34-39.)

It is interesting to note that in her brief the respondent has confirmed our statement of her position regarding the *language* of the "permit". We quote from page 32 of respondent's brief:

> "It can be readily seen that while the printed policy prohibited the keeping, using, and allowing of gasoline, *the occupancy clause in the rider was intended to and did permit it for any purpose not more hazardous than bottling automobile oils.*" (Italics ours.)

We submit that on her own statement of the proposition, as just quoted, respondent necessarily admits the error in the District Court's charge, for she concedes that the "permit" did not cover a "more hazardous" use of gasoline. Whether the storage and use of gasoline by the tenant Varisca to operate his moonshine stills was a "more hazardous" purpose, therefore, became, upon the evidence adduced at the trial, either a question of *law* or a question of *fact*. For the reasons pointed out more at length in petitioner's original brief (see brief, pages 43-46), and in the light of the authorities there cited, we submit that the tenant Varisca's use of gasoline in connection with the operation of his moonshine stills clearly fell within the classi-

fication of a "more hazardous" purpose, *as a matter of law.*

Furthermore, even if it could be said that the use made of the gasoline by Varisca was "not more hazardous" as a matter of law, then the question as to the relative hazards became one of *fact* for the jury. *This question was not submitted to the jury by the District Court,* as we pointed out in petitioner's original brief (see brief, pages 46-47).

However, respondent's brief contains numerous assertions that the jury passed upon this question in her favor. We quote the following extracts from pages 33 and 34 of respondent's brief:

> "Whether the keeping and using of gasoline for the purpose of operating stills, is more hazardous than the keeping and using of gasoline for the purpose of bottling automobile oils, is a question of fact. This fact was passed upon by the jury."
>
> "The question as to whether the hazard was increased during the last occupancy having been submitted to the jury and the jury having found for the respondent clearly the purpose for which the building was being used at the time of the fire was not more hazardous.
>
> The jury having found that the use being made of the premises was not more hazardous than was permitted by the policy, the petitioner cannot now claim that the purpose for which the building was being used at the time of the fire was more hazardous."

These assertions are wholly incorrect and unwarranted, as the record clearly shows. At respondent's own instance, the District Court refused to submit to the jury any question as to increase of hazard, *unless*

with it was combined the question of whether the respondent had "control or knowledge" thereof. In other words, the District Court instructed the jury throughout its charge that a verdict should not be returned in favor of the petitioner unless the jury believed both that (1) the hazard had been increased, and (2) the respondent had "control or knowledge" thereof. This is well illustrated by the District Court's summing up of the case adopted from Plaintiff's Instruction No. 10, as follows:

> "To sum up and state briefly and concisely the law applicable to the main issue in this case, you are charged by the Court that *the defendant Insurance Company cannot escape liability in this action unless it has proven to your satisfaction by a preponderance of the evidence that either the said Sophia C. Bachmann or her agent, the said Charles F. Bachmann, had knowledge of the matters and things alleged by the defendant to have been done and performed by Bill Varisca* and/or his associates and if, on the contrary, you believe from the evidence that neither the said Sophia C. Bachmann, or her agent, the said Charles F. Bachmann, had any control or knowledge of such matters and things, then your finding must be against the defendant Insurance Company and in favor of the plaintiff, Sophia C. Bachman." (R. 147). (Italics ours).

The respondent contends (see her brief, page 33) that under Defendant's Instruction No. 5, embodied by the District Court in its charge, "this fact (whether Varisca's use of gasoline was more hazardous) was passed upon by the jury". However, the record shows that Defendant's Instruction No. 5 (see R. 150) did not mention gasoline at all, and was tendered by the peti-

tioner solely in connection with its defense under the Increase of Hazard Warranty; consequently, the instruction required the jury to find both (1) an increase of hazard, and (2) control or knowledge of such increased hazard by the respondent, before a verdict could be returned for the petitioner. Hence, the verdict returned for the respondent did not constitute, in any sense, a finding that the operation of moonshine stills by gasoline was not a "more hazardous" purpose than its use as an ingredient in the bottling of automobile oils, or even that the fire hazard generally had not been increased. The gravamen of the respondent's argument in the District Court, as shown by the instructions which she tendered and which the District Court embodied in its charge, was that the petitioner had not sufficiently proven "control or knowledge" by respondent of the conditions prevailing in the insured building at and before the fire, and doubtless the acceptance of this argument by the jury is the explanation of its verdict.

Upon the examination of the record, and the charge of the District Court, the fact is inescapable that the District Court did not submit to the jury the simple question of whether gasoline was being used by the tenant Varisca for a "more hazardous" purpose. In every part of its charge, including the summing up at the end (R. 147), the District Court impressed upon the jury repeatedly that the question of whether the respondent had "control or knowledge" of the articles found in the Bachmann Building was the one important issue of fact in the case. Hence, we submit that the charge was erroneous, even under respondent's contention that it was a question of fact whether the use being made of the gasoline at the time of the fire was "more hazardous", and thus beyond the protection of

the "permit"; and *a fortiori* it was erroneous under petitioner's contention that the operation of moonshine stills by gasoline, under the conditions shown by the evidence, was more hazardous than the bottling of automobile oils, *as a matter of law.*

III.

THE CASE OF WHITLATCH v. MUTUAL FIRE INSURANCE COMPANY.

In our original brief, we cited the case of *Whitlatch v. Mutual Fire Insurance Company,* decided by the Supreme Court of Appeals of West Virginia on October 13, 1931; and the opinion of the West Virginia court was copied in full in Appendix A. At the time the original brief was printed and filed, the *Whitlatch Case* had not yet appeared in the reports. Since that time, however, the case has appeared in the Southeastern Reporter, and will be found in *161 S. E. 3.*

* * * * * * *

For the foregoing reasons, and those set forth more fully in petitioner's original brief, it is respectfully submitted that the judgment and decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Northern District of West Virginia, should be reversed.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OF AMERICA

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

CARL G. BACHMANN,
CHARLES J. SCHUCK,
J. BERNARD HANDLAN,
W. C. GRIMES,
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Wheeling, West Virginia.

INDEX TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

	Page
The Opinion of the Circuit Court of Appeals	3
Explanation	4
Statement of Facts	4
Argument	5
The cases of London and Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool and London and Globe Insurance Co. 134 U. S. 110, are not in conflict with the decision of the Circuit Court of Appeals in the present case	6
The cases of Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, when applied to the decision of the Circuit Court of Appeals, in the present case, are not in point	10
The case of Miller v. Union Assurance Society, 39 Fed. (2) 25, is not in conflict with the decision of the Circuit Court of Appeals in the present case	13
This case does not present a question of importance beyond the present case	16
Parts of the Insurance Contract Involved	18
Increase of Hazard Warranty	20
Prohibited Articles Warranty	20
The "Substituted Form" or Rider	20
Hand Book of Rules of the West Virginia Fire Underwriters Association	22
Petitioner's Specifications of Defense No. 2	26
Increase of Risk	32
Conclusion	35

TABLE OF CASES CITED

Bachmann v. St. Paul Fire & Marine Insurance Co., 49 Fed. (2) 158. (The present case)	3
Behler v. German Mutual Fire Insurance Co., 68 Ind. 347	15

	Page
Boling v. Insurance Company 86 W. Va. 165	28
Booher v. Insurance Company 91 W. Va. 468	28
Colker v. Connecticut Fire Insurance Co., 290 S. W. (Ky.) 1073	31
Fayle v. Camden Fire Insurance Association, 278 Pac. (Mont.) 509	31
First National Bank v. Hartford Fire Insurance Co., 95 U. S. 673, 678, 679	12
Gunther v. Liverpool and London and Globe Insurance Co., 134 U. S. 110	6
Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, 462	10
Liverpool and London and Globe Insurance v. Gunther, 116 U. S. 113	6
Martin v. Capital Insurance Co., 85 Ia. 643, 52 N. W. 534	15
Miller v. Union Assurance Society, 39 Fed. (2) 25	13
Missouri State Life Insurance Co. v. Guess, 17 Fed. (2) 450	28
Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U. S. 167	11
Nebraska Insurance Co. v. Christeinsen, 29 Neb. 572, 45 N. W. 924	15
Ragley v. Northwestern Insurance Co., 276 Pac. (Wash.) 537	32
Railway Mail Association v. Moore, 15 Fed. (2) 547	28
Royal Exchange Assurance Co. v. Thrower, 240 Fed. 811, 814, 815	30
Royal Exchange Assurance Co. v. Thrower, 246 Fed. 768	30
Shinn v. Insurance Co., 104 W. Va. 353	28
Thompson v. Phenix Insurance Co., 136 U. S. 287, 297	12
U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34	10

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SOPHIA C. BACHMANN, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I

OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals for the Fourth Circuit deciding this case on its merits will be found in 49 Fed. (2) 158, also at pages 185 to 189 of the Record.

II

EXPLANATION

For convenience and brevity, St. Paul Fire and Marine Insurance Company, a corporation, petitioner, is referred to as "petitioner" and Sophia C. Bachmann, respondent, as "respondent".

III

STATEMENT OF FACTS

On the 14th day of February, 1924, petitioner issued to respondent its policy of fire insurance for Four Thousand Dollars on a four-story brick building, occupied as a produce store, situate at 1312 Main Street, Wheeling, West Virginia.

In the Spring of 1925 at the request of the respondent, through her agent, the building, which was then being used by a tenant for the manufacturing and bottling of automobile oils, was inspected by petitioner's agent and there was attached to respondent's policy as a "Substituted Form", a rider or endorsement permitting the keeping, using and allowing of gasoline on the premises (R. p. 3-4).

On the 27th day of December, 1925, while the building was being occupied by another tenant, the insured building was totally destroyed by fire. It was claimed by petitioner that three stills and quantities of gasoline were found on the premises after the fire and the petitioner denied liability under two provisions of the policy. The evidence adduced on behalf of respondent tended to show there was NO GASOLINE on the premises at the time of the fire in question.

The building was managed by the husband of the respondent, who, as agent for the respondent, had for many years attended to all the details of supervising, maintaining and leasing the building.

It is conceded that the respondent knew nothing about the building or the tenant.

Evidence was offered on behalf of the petitioner, tending to show that Bachmann, the agent, knew or should have known that the building was used by the tenant for operating stills. This was vigorously denied by Bachmann, and in submitting the case to the jury, the judge instructed in accordance with the pleadings and in the language of the policy. The jury returned a verdict for the respondent.

IV

ARGUMENT

Petitioner urges and relies upon each of the following four grounds for the allowance of a writ of certiorari:

1. The decision of the Circuit Court of Appeals, in the present case, is in conflict with the decisions of this Court in Liverpool and London and Globe Insurance Co. v. Gunther, 116 U. S. 113, and Gunther v. Liverpool and London and Globe Insurance Co. 134 U. S. 110.
2. The decision of the Circuit Court of Appeals, in the present case, in seeking to apply the rule of strict construction is in conflict with the decision of this Court in Imperial Fire Insurance Co. v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34.

3. The decision of the Circuit Court of Appeals, in the present case, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2) 25.
4. The question presented here is of importance beyond the present case.

We respectfully submit that an examination of the cases relied upon, namely, the two Gunther cases, supra, the Coos County case, supra, the Guenther case, supra, and the Miller case, supra, and an inspection of the printed policy and the rider thereto attached, in the present case, will not justify the allowance of a writ of certiorari in this case.

1.

THE CASES OF LIVERPOOL AND LONDON AND GLOBE INSURANCE CO. v. GUNTHER, 116 U. S. 113, AND GUNTHER v. LIVERPOOL AND LONDON AND GLOBE INSURANCE CO., 134 U. S. 110.

Counsel for petitioner contend that the decision of this court in the Gunther Case, 116 U. S. 113, is in conflict with the decision of the Circuit Court of Appeals in the present case. This argument illustrates once again the futility of citing one case as a precedent for another, when the two decisions must turn upon the proper construction and interpretation of two wholly isolated private contracts, each presenting its own peculiar, independent and dissimilar provisions. The determining points upon which is founded the decision in the Gunther Case are not involved in the present case; the determining points which must dic-

tate the decision in the present case are altogether different, arising, as they do, from the peculiar language and provisions of the particular contract here under consideration. A careful examination of the Gunther Case and of the present case will disclose beyond all question that the respective contractual terms which are decisive of the result in each case are so entirely and utterly variant that a decision in one case could in no light be regarded as governing or controlling the other.

The policies in the Gunther Case prohibited the keeping or using of gasoline upon the insured premises, with this one specific exception, the

> "Privilege to use gasoline gas, gasometer blower and generator being underground about 60 feet from main building in vault. No heat employed in process."

There was no provision in the policies with respect to an increase of the fire hazard. There was no provision in the policies with respect to the necessity for showing knowledge of the insured of violations of the policy. At the time of the fire, in the Gunther case, gasoline stored in the oil room of the insured hotel was not being used in connection with the gasometer specified in the permit, but was being used either in torches for lighting a pavilion or for lighting picnic grounds some distance away. The use of gasoline at the time of the fire was thus clearly and obviously unwarranted by and in violation of the specific exception that it might be used in connection with the designated gasometer. No question as to INCREASE OF THE FIRE HAZARD was involved, since the policies carried no such clause. No question as to the KNOWLEDGE OF THE INSURED was material, since he had engaged that the

prohibited thing should not be done. The holding of this court, under the peculiar language of the policies involved and upon the basis of the facts disclosed, to the effect that

> "The naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, does not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy",

was clearly right.

The policy in the present case is entirely different. The policy in the present case (the original policy and the rider, as interpreted by the "Hand Book of Rules of West Virginia Fire Underwriters Association") permitted the keeping and using of gasoline upon the insured premises

> ". . . . for bottling automobile oils, offices and other occupancies not more hazardous . . ." ("Substituted Form" or rider.) (R. p. 3, 4.)

> ". . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and keep such materials as are usual in such occupancies". ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

> "It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Handbook of

> Rules of West Virginia Fire Underwriters Association.) (Caps ours.)

The policy provided, further, that

> ". . . . this company shall not be liable for loss or damage occurring.
> (b)—While the hazard is increased by any means within the control or knowledge of the insured."

Petitioner contended that after the fire three stills and quantities of gasoline were found on the insured premises. In order that the use of gasoline on the insured premises at the time of the fire might be held to constitute such violation of the policy as would absolve petitioner from liability, the burden rested upon petitioner to establish these two determining points: First, that the occupancy at the time of the fire was MORE HAZARDOUS than the bottling of automobile oils; and, Secondly, that the INCREASE OF THE FIRE HAZARD at the time of the fire was within the KNOWLEDGE OR CONTROL of the insured. The first of these two points petitioner failed to prove. The second point was decided by the jury ADVERSELY to petitioner. It is therefore submitted that the holding of the Circuit Court of Appeals, in view of the peculiar language of the policy involved and upon the basis of the facts disclosed (all so widely variant from those presented in the Gunther Case), to the effect that under the rider the tenant might keep or use gasoline upon the insured premises in unrestricted amounts in the bottling of automobile oils or in ANY OTHER OCCUPANCY NOT MORE HAZARDOUS, and so long as any increase of the fire hazard WAS NOT BROUGHT WITHIN THE KNOWLEDGE OR

CONTROL of the insured, was likewise clearly correct.

When the Gunther case came before this court for the second time, as reported in 134 U. S. 110, this court held that both policies were avoided by the drawing of carbon oil near a lighted lamp at dusk, because the policies permitted the drawing of oil by daylight only. Further discussion of the second Gunther case is therefore uncalled for, since the only point therein decided has no bearing, whatever, on the questions involved in the present case.

As contended above, it is apparent that the policies in the Gunther cases and the policy and rider in the present case differ in so far as they relate to the keeping, using and allowing of gasoline on the premises and as to the facts proved; and that the Gunther cases also differ from the present case as to the issues raised by the pleadings and determined by the jury.

An examination of both Gunther cases, will therefore disclose beyond all doubt or question that neither case is in any respect whatever, in conflict with the decision of the Circuit Court of Appeals in the present case.

2.

THE CASES OF IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY, 151 U. S. 452, and U. S. FIDELITY AND GUARANTY CO. v. GUENTHER, 281 U. S. 34.

We respectfully submit that the second ground urged, namely, that the decision of the Circuit Court of Appeals in the present case, is in conflict with the decision of this Court in Imperial Fire Insurance Com-

pany v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, is not in point.

The Circuit Court of Appeals in applying this rule of construction, was referring to an instruction relative to the "Increase of Hazard Warranty" and not to the "Prohibited Articles Warranty" as counsel for petitioner contend.

The following is quoted from the opinion of the Circuit Court of Appeals in this connection:

> "With respect to the Increased Hazard question, the policy provided as follows:
>
> 'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured.'
>
> "We know of no authority contrary to the principle that an insurance policy will be construed in a manner most favorable to the insured. This has been held by this court. (Missouri State Life Insurance Company vs. Guess, 17 Fed. (2) 450, and cases there cited.)
>
> "In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company, 263 U. S. 167, Mr. Justice Sutherland said:
>
> 'The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own

> words should be resolved against it. First National Bank vs. Hartford Fire Insurance Co., 95 U. S. 673, 678-679; Thompson vs. Phenix Insurance Co., 136 U. S. 287, 297; Imperial Fire Insurance Co. vs. Coos County; 151 U. S. 452, 462.'
>
> "Here the judge below charged the jury in the language of the policy, and we think fairly. It is not incumbent upon the courts to write another or a different contract of insurance between the parties. Had the Insurance Company desired to add to the contract the words 'reasonable cause to believe or know', it should have written the same into the policy, and we are of the opinion that the action of the judge below was right with regard to this question." (R. p. 187.)

Apparently counsel for petitioner have misconstrued the opinion of the Circuit Court of Appeals in this connection, since by comparing counsel's argument on pages 36 and 37 of petitioner's brief, with that part of the opinion of the Circuit Court of Appeals above referred to, it is very readily apparent that counsel for petitioner are contending something altogether different from that which the Court held in its opinion.

The fact is that the Circuit Court of Appeals did not apply this rule of construction to the "Prohibited Articles Warranty" but only to an instruction under the "Increase of Hazard Warranty", which a reading of the above opinion will unquestionably substantiate. (R. p. 187.)

3.

THE CASE OF MILLER v. UNION ASSURANCE SOCIETY, 39 FED. (2) 25.

The third ground relied upon, namely, that the decision of the Circuit Court of Appeals, in the present case, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2) 25, is absolutely and positively without merit, which an examination of the Miller case, supra, will disclose beyond any question.

We do not believe that counsel for the petitioner are serious in this contention. The fact of the matter is that the Miller case was called to the attention of the Circuit Court of Appeals of the Fourth Circuit, in the present case, in an elaborate oral argument and also in the brief filed by counsel for petitioner in that Court.

The Miller case was a suit in Equity and a Court of Equity held that the insured had knowledge of the increase in the fire hazard. The decision was based upon entirely different circumstances than was the decision of the Fourth Circuit Court of Appeals in the present case.

In the Miller case the insured had his place of business for several months in the same building in which the unlawful business was being conducted by the tenant and the insured's son and agent was seen in the room where the stills were located. This fact, as well as the other evidence mentioned in the opinion, warranted the Court in the Miller case in holding that the hazard was increased WITHIN THE KNOWLEDGE AND CONTROL of the insured.

In the present case, the question of whether or not the hazard was increased within the knowledge and

control of the respondent was properly submitted to the jury under petitioner's instructions Nos. 2, 5 and 7 (R. p. 154, 155, 156), and the jury decided the fact as to whether the respondent or her agent had knowledge, ADVERSELY, to the petitioner. In other words, the jury found that the FIRE HAZARD WAS NOT INCREASED within the KNOWLEDGE AND CONTROL of the respondent or her agent.

Furthermore, the "work and materials clause" in the Miller case very materially differs from the "work and materials clause" in the present case. In the Miller case, the "work and materials clause" reserved to the occupant the right to use

> . "the premises as is usual and incidental to the business . . . as conducted therein . . . WHEN NOT IN VIOLATION OF ANY LAW." (Caps ours.) MILLER v. UNION ASSURANCE SOCIETY, 39 Fed. (2) 25, p. 30.

The "work and materials clause" in the present case contained no provision RELATIVE TO THE VIOLATION OF ANY LAW. This clause, in the present case, is as follows:

> "And FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such materials as are usual in such occupancies." (R. p. 4.) (Caps ours.)

The Miller case held that the storing and using of gasoline on the premises could not be justified or excused under the "work and materials clause" in that policy, because this clause in the policy contained a

provision that the business conducted on the premises WAS NOT TO BE IN VIOLATION OF ANY LAW.

The court said in the Miller case, 39 Fed. (2) 25 on page 30:

> "obviously and admittedly, the materials were used in violation of law as the premises were being used not only to violate the prohibitory laws of the Government but the revenue law as well."

If a fire insurance policy contains no express prohibition of illegal use such use by a tenant without the knowledge or consent of insured will not violate the policy.

BEHLER v. GERMAN MUTUAL FIRE INS. CO. 68 Ind. 347.

MARTIN v. CAPITOL INSURANCE CO. 85 Ia. 643, 52 N. W. 534.

NEBRASKA INSURANCE CO. v. CHRISTEINSEN 29 NEB. 572, 45 N. W. 924.

There being an express prohibition of illegal use in the "work and materials clause" in the Miller case, and no express prohibition of illegal use in the "work and materials clause" in the present case, it can very readily be seen that there is no conflict between the decision of the Circuit Court of Appeals of the Eighth Circuit in the Miller case and the decision of the Fourth Circuit Court of Appeals in the present case.

4.

IMPORTANCE OF PRESENT CASE

Counsel for petitioner argue that the present case does not involve merely a question of the correct interpretation of an isolated private contract, but presents a question of importance beyond the present case. (Petitioner's Brief p. 40.) This contention is far-fetched.

We cannot comprehend how the decision in behalf of the respondent in the present case, can in any way generally affect the so called "New York Standard Form of Fire Insurance Policy." This policy expressly provides that the articles mentioned in the "Prohibited Articles Warranty" are not to be kept, used or allowed on the insured premises without the written consent of the company. In the present case, written consent was given and attached to the policy, not only to keep and use the prohibited articles in unlimited amounts for the purpose of bottling automobile oils but for ANY OTHER OCCUPANCY NOT MORE HAZARDOUS. The insurance contract, in the present case, is made up of the rider containing the "work and materials clause," and a description of the occupancies permitted when read and construed with the original printed policy. The business of manufacturing and bottling automobile oils, wherein quantities of gasoline may be used in unrestricted amounts, wherein alcohol may be distilled for the purpose of making anti-freezing solutions for automobiles necessarily would incur a great fire risk. In the absence of any showing that any other occupancy was more hazardous than the occupancy of manufacturing and bottling automobile oils, it cannot be seriously contended that the occupancy

at the time of the fire was more hazardous than the occupancy when the rider was attached to the policy.

The "Substituted Form" or rider of the policy in question, in the present case, is partly typewritten and partly printed, and therefore peculiar to this particular policy itself. Nor is it urged by petitioner that the "Hand Book of Rules of the West Virginia Fire Underwriters Association" contains the same rule as the Hand Book of Rules of Fire Underwriters Associations in other states. The unrestricted quantities and the great latitude permitted in the keeping and using of gasoline under the policy, the "Substituted Form" or rider, and the "Hand Book of Rules" referred to, present nothing else other than an interpretation of an isolated private contract growing out of the use of the insured premises for the USE OF BOTTLING AUTOMOBILE OILS, offices and other mercantile purposes NOT MORE HAZARDOUS, and for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS.

We respectfully submit that the "New York Standard Form of Fire Insurance Policy" is in no way affected by the decision in the present case, only when a "Substituted Form" or rider is attached to the policy, specifically mentioning "the bottling of automobile oils" and ANY OTHER OCCUPANCY NOT MORE HAZARDOUS and when based upon the facts and circumstances as developed in the present case.

The fact is that the petitioner has done everything possible to keep from paying to respondent a just and rightful claim, and in line with its conduct in this connection it is endeavoring to make it appear, in urging this particular ground for a writ of certiorari, that the "New York Standard Form of Fire Insurance Policy",

wherever it may be in force, is affected by the decision of the Circuit Court of Appeals in the present case.

The statement of facts in the petition and brief of Counsel for petitioner do not give an accurate picture of the situation in the present case. Statements based upon the testimony in behalf of the petitioner, but denied by the respondent, are stated as facts, for instance, "the keeping and using of gasoline on the premises," all of which was denied by respondent, and certain wording contained in what is referred to as the "work and materials clause" is omitted. The "Substituted Form" or rider contains the words "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS." Counsel for Petitioner entirely omit and ignore these words "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS." (Petitioner's Brief p. 3, 15), and which are so important and significant in arriving at a decision in this case.

PARTS OF INSURANCE CONTRACT INVOLVED

The Printed Policy

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occuring. . . .

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED, or

(d) . . . THERE IS KEPT, USED OR ALLOWED on the described premises . . . GASOLINE . . ." (Printed Policy.) (R. p. 7.) (Caps ours.)

The "Substituted Form" or Rider

"Four thousand dollars on three-story brick building . . . occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS.

"Privileges Granted . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such MATERIALS as are usual in such occupancies." ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

Hand Book of Rules West Virginia Fire Underwriters Association

"Privilege . . . for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies.

"Note: It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Hand Book of Rules West Virginia Fire Underwriters Association.) (R. p. 92.) (Caps ours.)

The petitioner denied liability under two provisions of the policy, which for brevity may be called the "Increase of Hazard Warranty" and the "Prohibited Articles Warranty." (R. p. 12, 14.)

The policy provided as follows:

(1) Increase of Hazard Warranty.

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring . . .

(b) WHILE THE HAZARD IS INCREASED by any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED." (R. p. 7.) (Caps ours.)

(2) Prohibited Articles Warranty.

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring

(d) While there is KEPT, USED OR ALLOWED ON THE DESCRIBED PREMISES . . . GASOLINE . . ." (R. p. 7.) (Caps ours.)

Several months before the fire and after the policy had been issued and in force, at the request of the respondent through her agent, the building was inspected by petitioner's agent and there was attached to respondent"s policy as a "Substituted Form", a rider or endorsement permitting the keeping, using and allowing of gasoline on the premises, because the tenant at that time was manufacturing automobile oils and necessarily used GASOLINE in his manufacturing process. All of which is not denied by petitioner.

The ridet referred to is as follows:

"Four thousand dollars on three-story brick building . . . occupied for BOTTLING AUTOMOBILE OILS, OFFICES

AND OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil . . . and for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 3, 4.) (Caps ours.)

When this rider was added to the policy it entirely changed the printed provision of the policy known as the "Prohibited Articles Warranty" in so far as the keeping, using and allowing of gasoline was concerned, in that it permitted the keeping, using and allowing of those prohibited materials mentioned in the "Prohibited Articles Warranty" FOR THE PRESENT OR OTHER OCCUPANCIES NOT MORE HAZARDOUS; that is, it struck out the printed provision (d) in the "Prohibited Articles Warranty" and read into the policy in its place, the right to keep, use and allow the MATERIALS needed, in unrestricted quantities or amounts for BOTTLING AUTOMOBILE OILS AND OTHER PURPOSES NOT MORE HAZARDOUS. There can be no doubt that it was the intention of the parties, particularly of the petitioner, to permit the keeping, using and allowing of the prohibited materials mentioned in section (d) "Prohibited Articles Warranty" for the purpose of bottling automobile oils and OTHER OCCUPANCIES NOT MORE HAZARDOUS when it attached this rider to the policy.

If the premises were to be occupied other than for bottling automobile oils, that occupancy was not to be MORE HAZARDOUS than bottling automobile oils,

that is, it was not to be an occupancy which increased the fire hazard.

It must be remembered that under the rider OTHER OCCUPANCIES were permitted, so long as they were NOT MORE HAZARDOUS than the hazard incident to bottling automobile oils, that is, so long as the other occupancies did not increase the fire hazard.

The petitioner intended, when it attached this rider to the policy, that gasoline and other prohibited articles could be kept, used and allowed but the fire hazard should not be increased during other occupancies by any means within the knowledge and control of the insured.

The "Hand Book of Rules" required to be filed in the office of the Commissioner of Insurance of the State of West Virginia (R. p. 91) and in use by the West Virginia Fire Underwriters Association and which was used by the fire insurance companies doing business in West Virginia in 1925, defines what the term MATERIALS means as used in the rider referred to. On page 73 of this book is found the following:

> "Privilege for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 92.) (Caps ours.)
>
> "Note: It is understood that the word MATERIALS as used above, includes GASOLINE, and such other materials as are prohibited by the printed provisions of the policy when kept and used for such purposes as are usual to the occupancies permitted." (R. p. 92.) (Caps ours.)

The petitioner by its own interpretation of the word MATERIALS as used in the rider admits that it includes GASOLINE and the other prohibited materials mentioned in the printed provisions of the policy.

If it was the intention of the petitioner to free itself from liability providing prohibited materials were kept, used or allowed in occupancies that were more hazardous than permitted under the rider, then it should have stated in the rider that if any of the prohibited materials are kept, used or allowed in other occupancies that are more hazardous the Company would not be liable. This it did not do and it is very evident that it therefore relied upon the "Increase of Hazard Warranty" of the printed policy. (R. p. 7.)

That the rider completely changed the printed conditions of the policy there can be no doubt. A comparison of the provisions of the rider under PRIVILEGES GRANTED (R. p. 4) with the printed provisions of the policy (R. p. 7) will disclose just what was intended. The printed policy provides:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occuring
>
> (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered, in whole or in part by this policy." (R. p. 7.)

The rider contains the following:

> "PRIVILEGES GRANTED . . . for other insurance without notice until required." (R. p. 4.)

Clearly the printed provision of the policy prohibited other insurance while the rider permitted additional insurance.

Again the printed provision of the policy provides:

> "(c) While mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days." (R. p. 7.)

The rider contains the following:

> "to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions."

So here again the printed provision of the policy prohibited alterations and repairs beyond a period of fifteen days while the rider permitted alterations and repairs to be made for sixty days at any one time. (R. p. 4.)

Again the printed provision of the policy provides:

> "(f) While a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days." (R. p. 8.)

The rider contains the following:

> "to be vacant not exceeding sixty consecutive days; to be unoccupied not exceeding sixty consecutive days." (R. p. 4.)

Here again the printed provision of the policy prohibited the premises to be vacant or unoccupied for not more than ten days while the rider permitted it to be vacant and unoccupied for sixty consecutive days.

Again the printed provision of the policy provides:

> "(d) While illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises; fireworks, greek fire, phosphorous, explosives, benzine, GASOLINE, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. p. 7.) (Caps ours.)

The rider contains the following provision:

> "To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than ten feet from artificial light, except incandescent electric light: . . . and FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 4.) (Caps ours.)

Here again section (d) has been completely changed.

It will be noted that the provisions of the printed policy, namely, sections (a), (c), (d) and (f), were all changed by the rider, while sections (b), (e) and (g), of the printed policy were not destroyed by the rider.

In other words, if the policy was redrafted in this connection, it would read substantially as follows:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring:
>
> (b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED; or
>
> (e) If the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M. or while it ceased to be operated beyond a period of ten days; or,
>
> (g) By explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." (R. p. 7, 8.)

WHEN THE RIDER IS ADDED TO THE ABOVE, THE POLICY IS COMPLETE.

The petitioner so construed the policy in this connection, because when we read its "Specifications of Defense" we find ITS OWN PLEADINGS alleges that the respondent or her agent WELL KNEW that GASOLINE, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon the insured premises.

Petitioner's "Specification of Defense No. 2" is as follows:

> "The defense says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed

upon and about the insured premises ALL OF WHICH WAS WELL KNOWN TO THE PLAINTIFF AND HER AGENT OR AGENTS, and was in violation of the foregoing condition and warranty." (R. p. 14.) (Caps ours.)

The petitioner cannot now complain or have a construction placed upon the policy in this case which is favorable to it, in view of the fact that the petitioner itself is responsible for the wording contained in the policy.

There is abundance of authority holding that where doubts arise as to the proper construction of clauses in insurance contracts that view which is most favorable to the insured must be adopted.

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company 263 U. S. 167, Mr. Justice Sutherland said:

> "The language employed is that of the Company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

FIRST NATIONAL BANK v. HARTFORD INSURANCE CO. 95 U. S. 673, 678-679;

THOMPSON v. PHENIX INSURANCE CO. 136 U. S. 287, 297;

IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY 151 U. S. 452, 462.

> "An insurance policy will be construed in a manner most favorable to the insured."

MISSOURI STATE LIFE INSURANCE CO. v. GUESS. 17 Fed. (2) 450 AND CASES THERE CITED.

"Courts do not favor forfeiture and where doubts arise will adopt construction of policy most favorable to insured and which will prevent annulment."

RAILWAY MAIL ASS'N v. MOORE. 15 Fed. (2) 547.

"It is well settled law that where doubts arise as to the proper construction of clauses in insurance contracts, that view of them must be adopted which is most favorable to the insured, and which will prevent a forfeiture of his rights under the policy. FORFEITURES ARE NEVER FAVORED BY THE COURTS." (Caps ours.)

BOOHER v. FARMERS' MUTUAL FIRE ASSOCIATION 91 W. Va. 468.

"Contracts of insurance are to be construed most strongly against the insurer and in favor of the insured."

SHINN v. W. VA. INS. CO. 104 W. Va. 353.

"If the language of a forfeiture clause in an insurance policy is susceptible of two constructions, the one more favorable to the insured is to be adopted."

BOLING v. CONTINENTAL INS. CO., 86 W. Va., 165.

In order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery

by the respondent, the petitioner must, under the terms of the policy, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE respondent or her agent. This it failed to do.

It cannot be doubted that, under the rider, any other occupancy NOT MORE HAZARDOUS was permitted. That, undoubtedly, means any occupancy which did not increase the fire hazard. Therefore, the policy and rider present two separate clauses relating to increase of hazard. One providing that:

> Gasoline shall not be kept, used or allowed in an occupancy where the hazard is increased.

And the other providing that:

> If the HAZARD IS INCREASED BY ANY MEANS, it must be within the knowledge or control of the insured.

It is very readily apparent that these two provisions relate to an increase in the fire hazard. And if there was an increase in the fire hazard at the time of the fire by the tenant then occupying the building WHICH WAS NOT PROVEN in order to excuse the petitioner from liability, the petitioner must, under the terms of the policy and rider, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE INSURED. THIS WAS THE PETITIONER'S OWN CONTENTION AND POSITION IN THE TRIAL COURT as shown by its "Specification of Defense No. 2" herein referred to (R. p. 14).

Clearly whether or not the hazard was increased within the knowledge and control of the respondent, was a question of fact for the jury to decide and being

a question of fact overwhelmingly supported by a preponderance of the testimony, the jury found for the respondent.

The Court in the case of ROYAL EXCHANGE ASSURANCE COMPANY v. THROWER said on page 816.

> "It is this language 'WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED' that differentiates policies like this from many policies as to which it has been held that the act of the tenant is the act of the landlord." (Caps ours.)
>
> ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 816, Affirmed 246 Fed. 768.

The following is quoted from the opinion of the Court in the above case on pages 814, 815:

> "That the insured ought to have known, must have known, should have known, is not enough. The insured must have knowledge of the particular use to which the building was being put by the tenant. The language is 'any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED.' To control the matter it would seem to be necessary that the insured should have had some knowledge of what was being done in the building. It does not seem that an owner can be held to the duty of controlling that of which he does not know. The duty to control involved, reasonably and fairly, some knowledge of the hazardous use of the building; otherwise the forfeiture would be worked simply because the

insured was the owner of the building, and the people who caused the hazard were his tenants. The language of the policy would be given no effect, that the forfeiture should result from the increased hazard by means within the CONTROL OR KNOWLEDGE of the insured. There is abundant authority for holding that, where there was language like this in the policy, the owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 814, 815. Affirmed 246 Fed. 768.

In the case of FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION, the Court held:

"Where owner of dwelling house rented building for dwelling house purposes without knowledge that tenant was operating a STILL therein POLICY OF FIRE INSURANCE COVERING BUILDING WAS NOT AVOIDED BECAUSE OF INCREASE OF HAZARD OR CHANGE OF OCCUPANCY BY REASON OF OPERATION OF STILL BY TENANT." (Caps ours.)

FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION 278 PAC. (MONT) 509 (June 1929).

In the case of COLKER v. CONNECTICUT FIRE INSURANCE COMPANY the Court held:

". . . where the insured leased part of his building to a tenant FOR STORAGE

> PURPOSES, the insurer was not released from liability or loss through fire by fact that tenant, without knowledge or consent of insured, operated a still on premises; PROVISION FOR AVOIDING POLICY BECAUSE OF INCREASED HAZARD NOT RELIEVING INSURER FROM LIABILITY IN SUCH CASE." (Caps ours.)
>
> COLKER v. CONN. F. INS. CO., 290 S. W. (Ky.) 1073.

In the case of RAGLEY v. NORTHWESTERN INSURANCE COMPANY the Court held:

> ". . . that where owners renting house insured for dwelling house purposes had no cause to believe that dwelling was used for manufacture of liquor THEY WOULD NOT BE CHARGEABLE WITH MANUFACTURE OF LIQUOR AT THE TIME OF FIRE, SO AS TO RENDER POLICY VOID, even though such manufacture was such as might, as against tenant, be regarded as one of the principal uses of the house." (Caps ours.)
>
> RAGLEY v. NORTHWESTERN INS. CO., 276 Pac. (Wash.) 537.

INCREASE OF RISK

While the respondent emphatically denies that there was any gasoline on the premises at the time of the fire, yet in order to fully present all the questions involved, to the Court for its consideration, we are assuming for the sake of comparison that certain testimony given

for the petitioner, even if true, would but tend to show, that the use of the premises by the tenant, Varisca, in the manner described by the Petitioner's witness, Doerr, did not in any respect increase the risk so far as the fire hazard was concerned when compared with the risk assumed by the petitioner at the time the tenant Huff occupied the premises in question. It was, of course, the duty of the petitioner to prove that there was an increase of hazard, which petitioner did not do. That is, that the fire risk to the building was increased when it was occupied by the tenant Varisca, as compared with the risk assumed when occupied by the tenant, Huff.

The rider heretofore referred to, page 3 of the Record, established the manner in which and the purposes for which the building could be occupied and the risk permitted thereunder.

For the purposes of this argument, let us assume that the fire had occurred in the building during the occupancy of the tenant Huff, and that at the time of the fire, Huff was manufacturing automobile oils, and in that connection had stored on the premises quantities of gasoline and was also using gasoline for the purpose of operating a still, to make alcohol, such alcohol to be used in connection with his business of bottling automobile oils, and that according to his testimony (R. p. 130) he was using HOTPLATE in connection with the operation of the still.

And also further that Huff, at the time of the fire, was operating a still with gasoline for the purpose of distilling water to be used in the process of manufacturing and bottling automobile oils.

Under these circumstances and conditions, could it

be said that the petitioner would not be liable under the rider which was attached to the policy?

Surely, in view of the fact that gasoline and other prohibited articles were permitted to be used, kept and allowed in unrestricted amounts, and in further view of the fact that there were no restrictions as to how the gasoline and other articles were to be used, so long as they were used in connection with bottling automobile oils, the petitioner would undoubtedly be liable. And yet, so far as the petitioner's case is concerned, considering the testimony of its witness, Doerr, and assuming merely for the sake of the argument that he detailed the facts as found with reference to the still, then we respectfully submit we have the identical situation presented, as that heretofore outlined in case Huff had been operating his business at the time of the fire.

The witness, Doerr, testified (R. p. 59) in detailing the apparatus found in the building:

> "The still was upon a HOTPLATE, operated by a gasoline compressor tank, or rather fed from a gasoline compressor tank."

showing in this respect the similarity of the operation, the use of the same apparatus, to-wit, hotplate, and consequently no increase so far as the risk or hazard would be concerned.

Operated in identically the same manner, the use of the still for manufacturing liquor, could not be more hazardous, than the manufacturing of alcohol by stills or the making of distilled water on the part of Huff. It may be urged, however, that the use of stills for manufacturing liquor was illegal, and therefore more haz-

ardous; this contention, however, is not well taken, since it must be remembered that there was no provision in the policy which made the polity void if the insured premises were being occupied for an unlawful or illegal purpose.

It must also be remembered that it was the duty of the petitioner to prove there was an increase of hazard. It was, therefore, incumbent upon it to prove that the keeping, using and allowing of gasoline on the premises for the operation of stills increased the fire risk during the occupancy of the building by Varisca, and that this was a greater risk than was permitted under the occupancy of Huff. This petitioner did not do; and in view of such failure then there can be no question but that the verdict of the jury in finding for respondent was correct and just.

CONCLUSION

IN CONCLUSION, in this respect we beg to submit that taking into consideration the policy and the rider and the law governing the interpretation of this particular policy, the respondent had the right to have gasoline on the premises in unlimited quantities, and if perchance it was used in an unlawful or illegal business, then the use of it in such case had to be with the knowledge and under the control of the respondent before she could be denied the right to recover in this case, assuming, of course, that the illegal or unlawful business did not increase the fire risk and was, therefore, not more hazardous.

For the foregoing reasons, respondent prays that a writ of certiorari be denied.

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FILED
DEC 31
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

CARL G. BACHMANN,
CHAS. J. SCHUCK,
W. C. GRIMES,
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INDEX TO BRIEF

	Page
The Opinion of the Circuit Court of Appeals	1
Explanatory	2
Proceedings had in the District Court	2
Restatement of the Case	9
Summary of the Argument	15
Argument	18
(a) Petitioner is Bound by Issues Joined in Trial Court	18
(b) Petitioner is Bound by Theory on which Case was Tried in Trial Court	26
(c) Effect of "Rider"	28
(d) Petitioner assumes that there was an Increase of Hazard	50
(e) Respondent's Instructions Complained Of	51
"Defendant's Instruction No. 8"	51
"Defendant's Instructions Nos. 1, 1A, 1B, 1C, 3, 4 and 6"	55
"Defendant's Instruction No. 1-b"	60
"Defendant's Instruction No. 3"	60
"Defendant's Instruction No. 4"	61
Petitioner's Instruction No. 6, Refused	62
Defendant's Instruction No. 7, Refused	63
(f) Summary of Petitioner's Exceptions to Court's Ruling in Refusing to Grant its Instructions hereinbefore Mentioned	64
(g) Other Assignments of Error	66
(h) Cases Relied on by Petitioner Distinguished from Case at Bar	66
Conclusion	72

TABLE OF CASES CITED

Albany Perforated Wrapping Paper Co. v. John Hoberg Co. 109 Fed. 589, 48 C. C. A. 559 (infringement of trade-mark) 16

Alford v. Kanawha, etc. R. Co., 84 W. Va., 570, 100 S. E. 402 17

Baker v. Kaiser, 126 Fed. 317, 61 C. C. A. 303 16

Bankers Loan Assoc. v. Liscow, 47 Neb. 340, 66 N. W. 412 25

Basset v. Erickson Constr. Co. 213 Fed. 810, 130 C. C. A. 468 17

Behler v. German Mutual Fire Ins. Co. 68 Ind. 347 72

Booher v. Farmers' Mutual Fire Assoc. 91 W. Va., 468 46

Boling v. Continental Ins. Co., 86 W. Va. 165 46

Brockenbrough v. Champion Fibre Co., 176 Fed. 840, 100 C. C. A. 310 ..... 16, 28

Bush v. Ralphsnyder, 100 W. Va. 464, 470, 130 S. E. 807 17

Page

Catlett v. Pac. Ins. Co., 5 Fed. Cases No. 2517 24
Chambers v. Northwestern Ins. Co., 64 Minn. 495 15
Chicago, etc., Railroad Co. v. Rovine, 61 Miss. 288 23
Chicago, etc. R. Co. v. DeClow, 124 Fed. 142, 61 C. C. A. 34 16
Clarke v. Clarke 70 W. Va. 428 22
Commonwealth v. Snelling 15 Pick (Mass) 321 23
Colker v. Conn. F. Ins. Co. 290 S. W. (Ky) 1073 ..... 50, 51
4 Crouch on Ins. 3371 52
19 Cyc. 736 59
33 C. J. 108, Sec. 828 ..... 16, 19
3 C. J. p. 718-721 21
26 C. J. 514, Sec. 721 ..... 16, 19,
33 C. J. 102, Sec. 819 24
22 C. J. 331 15
32 C. J. 1296, Sec. 526 56
2 Ency. of Ev. 422 23
Farmers and Mechanics Ins. Co. v. Simmons, 30 Pa. St. 299 56
Faust v. Ins. Co., 64 N. W. (Wis.) 383 53
Fayle v. Camden Fire Ins. Assoc. 278 Pac. (Mont.) 509 49
First National Bank v. Hartford Ins. Co. 95 U. S. 673, 678, 679 45
Fountain v. Connecticut Fire Ins. Co., 117 Pac. 630 20
Fraim v. Fire Ins. Co., 32 Atl. (Pa.) 613, L. R. A. 1917 C. 284 53
General Fireproofing Co. v. Wallace, 175 Fed. 650, 99 C.C.A. 204 16
Gilpin v. Howell, 5 P. St. 41, 45 Am. Dec. 720 23
Globe v. Rutgers Fire Ins. Co., 113 N. E. (Ind.) 425 53
Grand Trunk R. Co. v. Ives 144, U. S. 408 61
Groves v. Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324 24
Hanley v. Aetna Ins. Co., 215 Mass. 425, 102 N. E. 641, Ann. Case 1914-D-53 20
Hanson v. Smith 94 Fed. 960 24
Harrington v. Hanover Fire Ins. Co. 5 N. Y. S. 417 20
Hickory vs. U. S. 160 U. S. 408 61
Home Benefit Assoc. v. Sargent, 142 U. S. 691, 700, 35 L. Ed. 1160 56
Indiana and Ohio Live Stock Ins. Co. 74 W. Va., 244, 81 S. E. 984 22
Ins. Co. v. Piaggio, 16 Wall, 378, 21 L. Ed. 358 56
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462 45
Kenyon v. Wakes 2 Mees & W. 764 23
Knoop v. Kelsey, 102 Mo. 291, 22 Am. St. Reps. 777 27
Kruger v. Western F. Ins. Co., 13 Pac. (Cal.) 156 53
Lee v. Heath (N. J.) 39 Athl. 729 23

Page
Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 126 25
Logan v. Provident Savings Life Ass. Soc. of N. Y. 57 W. Va. 384, 390 15-19
London & Lancashire Fire Ins. v. Fisher, 92 Fed. 500, 34 C.C.A. 503 59
Martin v. Capitol Ins. Co. 85 Ia. 643, 52 N. W. 534 72
1 May on Ins. (4th Ed.) Sec. 241 ..... 56, 57
Melton v. Pensacola Bank, etc. Co. 190 Fed. 126, 111 C. C.A. 166 ..... 16, 28
Mesa Market Co. v. Crosby, 174 Fed. 96, 98 C. C. A. 70 17
Merrill v. Ins. Co. 23 Fed. 245 50
Merchants and Man. Ins. Co. v. Wash. Ins. Co., 1 Handy (Ohio) 181 57
Miller v. Union Assurance Soc., 39 Fed. (2) 25, p. 30 ..... 70, 71
Missouri State Life Ins. Co. v. Guess, 17 Fed. (2) 450 and cases there cited 45
Morrison v. Atkinson 16 Okla. 571, 8 Ann. Cases 468 and note, 85 Pac. 472 27
McKinnie v. Lane, 230 Ill. 544, 120, A. S. R. 338 22
McMaster v. New York Life Ins. Co., 90 Fed. 40, 99 Fed. (C. C. A.) 856 16
Nebraska Ins. Co. v. Christensen 29 Neb. 572, 45 N. W. 924 72
Needer v. Provident Savings Life Assurance Soc., 58 App. Div. 80, 68 N. Y. S. 518 25
New York Life Ins. Co. v. McPherson, 137 Ala. 116, 33 S. 825 25
North British Ins. Co. v. Union Co., 87 S. W. (Ky.) 285 58
Northwestern Ins. Co. v. Morris, 165 N. E. (Ohio) 506 51
Penna. Mutual Aid Society v. Corley, 2 Penny. (Penna) 398 25
Phoenix Ins. Co. v. Lawrence, 81 Am. Dec. (Ky.) 521 25
Pierce v. Cohasset Ins. Co., 123 Mass. 572, 573 24
Provident Savings Life Assoc. Society v. Bruett, 157 Ala. 540, 47 S. 1019 25
Ragley v. N. W. Ins. Co. 276 Pac. (Wash) 537 ..... 50, 51
Railway Mail Assoc. v. Moore 15 Fed. (2-d) 547 ..... 20, 45
Richmond v. Oregon R. etc., Co., 137 Fed. 848, 70 C. C. A. 378 16
Richelieu, etc., Nav. Co. v. Boston Marine and Ins. Co. 136 U. S. 408, 423 61
Rio Grande Western R. Co. v. Leak 163 U. S. 280 61
Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 287, 41 L. Ed. 160 56
10 R. C. L., p. 699, sec. 27 15
10 R. C. L., p. 701, sec. 28 ..... 17, 27
14 R. C. L., p. 1084, sec. 262 ..... 18, 19
21 R. C. L., p. 482, sec. 45 22

Page
21 R. C. L., p. 480, sec. 43 22
Royal Exchange Assurance Co. v. Thrower, 240 Fed. 811, 814, 815, affirmed 46 Fed. 768 ..... 47, 48, 49
Sandersville Oil Mill Co. v. Globe Ins. Co., 124 S. E. 728, 32 Ga. (App.) 722 59
Sanford v. Mechanics Mutual Fire Ins. Co., 12 Cush. (Mass.) 541 57
San. Juan Light, etc. Co. v. Requenna, 224 U. S. 89, 32 Sct. 399, 56 L. Ed. 680 ..... 16, 28
Seyler v. British American Assurance Co., 72 W. Va., 120, 77 S. E. 555 22
Shepherd v. Peabody Ins. Co., 21 W. Va. 368 15
Shinn v. W. Va. Ins. Co., 104 W. Va. 353 46
Simmons v. W. Va. Ins. Co., 8 W. Va. 474 24
Sol Smith Russell v. Mfg. & Bldrs. Fire Ins. Co. of N. Y., 50 Minn. 409 58
Springfield Fire & Marine Ins. Co. v. Wade (1092), 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870 59
St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186 20
Starkweather v. Kittle, 17 Wend. (N. Y.) 20 23
Sutherland v. Sutherland, 102 Ia. 535, 63 ASR 477 and note 27
Swift vs. Patrons Ins. Co., 125 Me. 255, 132 Atl. 745 58
Tarbul v. Royal Ex. Shipping Co., 110 N. Y. 170, 6 ASK 350 27
Texas, etc. R. Co. v. Cibilene Cotton Oil Co., 204 U. S. 426, 27 Sct. 350, 51 L. Ed. 553 17
Thomas v. Taylor, 224 U. S. 73, 32 Sct. 403, 56 L. Ed. 673 17
Thompson v. Phoenix Ins. Co., 136 U. S., 287, 297 45
Union Pac. R. Co. v. James, 163 U. S. 486, 490, 41 L. Ed. 236 56
U. S. v. Dashiel, 4 Wall 182, 185, 18 L. Ed. 319 56
Vertovich v. U. S., 205 U. S. 86, 92 61
White v. Mutual Fire Ins. Co., 8 Gray (Mass) 566 57

STATUTES CITED

West Virginia Laws of 1923, Ch. 125, Sec. 64 20

Supreme Court of the United States

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

CARL G. BACHMANN,
CHAS. J. SCHUCK,
W. C. GRIMES,
J. BERNARD HANDLAN,
Wheeling, W. Va.
Counsel for Respondent.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed on April 15, 1931, and is

found at pages 176 to 180 of the Record. The opinion is officially reported in 49 Fed. (2nd) 158. No additional opinion was handed down with the order denying the rehearing.

EXPLANATORY.

For convenience and brevity, St. Paul Fire and Marine Insurance Company, a corporation, petitioner, is referred to as "petitioner," and Sophia C. Bachmann, respondent, as "respondent."

PROCEEDINGS HAD IN THE DISTRICT COURT

This case came on for trial in the District Court on plaintiff's declaration filed in said Court, May 25, 1926, which declaration is set out in full (R. 1). Thereupon, defendant in United States District Court filed the general issue plea and plaintiff joined therein (R. 11) and the defendant below, petitioner in this Court, tendered its specifications of defense on August 2, 1926 (R. 11).

The specifications of defense tendered by defendant below set up what petitioner refers to as the "Increase of Hazard Warranty" (R. 12) and the "Prohibited Articles Warranty" (R. 13), and also warranty against concealing or misrepresenting any material fact or circumstances concerning the insurance (R. 14). The last mentioned defense was withdrawn by petitioner in Court below (R. 17).

The petitioner, defendant in the Court below, sets up the specifications of defense as follows:

I

"The policy upon which this action is based contains the following condition and warranty:

" 'Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured.'

"The defendant says that at and before the time of the fire complained of, the fire hazard upon the insured building was greatly increased by divers means within the knowledge and control of the plaintiff and her agent or agents, and in at least three separate and distinct particulars, each and all of which, both separately and as a whole, constituted a violation of the above quoted condition and warranty, as herein below set forth, to-wit:

"(a) Some time prior to said fire, to-wit, about the first day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent or agents, to one Bill Varisca, for a certain term, to-wit, eighteen months; that at the time of the fire, and prior therto, said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquors; that the operation of said stills upon said premises was in express violation of the prohibition and other laws of the United States, as well as of the State of West Virginia, and thereby subjected the said Bill Varisca and his associates, in case of discovery, to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner, and for the most

part during the night time, with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning thereof, and for the extinguishment of the same, could not and would not be used by the said occupants of the building; and that, in many other ways, said unlawful, illegal, and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained of herein, all of which was then and there known to the plaintiff and her agent or agents.

"(b) The defendant further says that the moonshine still or stills aforesaid were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible, and explosive substances used in and about their operation; that especially the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom; and that the fire hazard to the insured building was greatly increased thereby, and in fact caused or contributed to the fire herein complained of, all of which facts were within the knowledge and control of the plaintiff and her agent or agents.

"(c) In connection with the operation of said moonshine still or stills, said Bill Varisca and his associates necessarily used large quantities of gasoline, mash, and other highly combustible, inflammable, and explosive substances, as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the insured building, and directly caused or contributed to the fire of which the plaintiff complains in this action. The defendant further says that the plaintiff, and her agent or agents had knowledge and control of such increased hazard at and before the time of the fire."

II

"The following condition and warranty is also found in said policy:

" 'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels.'

"The defendant says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty."

The first above mentioned warranty in specifications of defense, relates to what is known as the "Increase of Hazard Warranty." The petitioner does not claim any errors in the Court below with reference to proof nor instructions given relating to this warranty as contained in the original policy. The second specification of defense relates to what the petitioner terms "Prohibited Articles Warranty." Since warranty relating to concealment or misrepresentation of material facts was withdrawn by defendant below, we have not set it out. To the above specification of defense, the plaintiff be-

low, on the day of the trial joined issue and filed its reply thereto (R. 15), which reply is as follows:

No. 1.

"Plaintiff answering defendant's Specifications of Defense No. 1 (a), No. 1 (b) and No. 1 (c) for answer says, that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said Specifications; that neither she nor her agent or agents had any knowledge or control of, over or concerning any of said facts, charges and allegations. Plaintiff replying further says that added and attached to and made a part of the policy of insurance sued upon herein is a certain agreement in writing (commonly called a rider) which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is of the following tenor:

FORM NO. 4
Sustituted Form
Mercantile Building under Protection
(Standard Form W. Va. Fire Underwriters' Association)

"$4,000.00 on three story brick building, with approved roof and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all per-

manent fixtures thereon, situate at No. 1312 Main Street, Wheeling, W. Va.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than 10 feet from artificial light, except incandescent electric light; for other insurance without notice until required; to be vacant not exceeding sixty (60) consecutive days; to be unoccupied not exceeding sixty (60) consecutive days; to make ordinary alterations and repairs in the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein, or adjacent, and such alterations; to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions; and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies. . . . . ."

And for further answer and reply to said specification No. 1 (a), No. 1 (b) and No. 1 (c) the said plaintiff joins issue thereon.

No. 2.

For answer to the defendant's Specification of Defense No. 2, plaintiff says that neither she nor her agent or agents had any knowledge of the

facts, charges and allegations set out in said specification; that neither she nor her agent or agents had any knowledge or control of over or concerning said facts, charges and allegations nor of any increased hazard at or before the time of the fire. Plaintiff replying further says that added and attached to and made part of the policy of insurance sued upon herein is that certain agreement in writing (commonly called the rider), which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is set out in extenso in plaintiff's answer to Specification No. 1 (a), 1 (b) and 1 (c) and which is here referred to and by reference thereto is made part hereof.

Plaintiff says further that prior to and to ascertain the condition and contents of said insured premises and property with specific and particular reference to the advisability of executing and attaching said rider to said policy that the defendant's duly authorized agent went upon and inspected said insured premises and the contents thereof and was fully apprised and advised as to the condition of said premises and of said contents, materials and supplies and of the nature and of the business which was then being carried on therein and thereon.

And for further answer and reply to said Specifications of Defense No. 2, the said plaintiff joins issue thereon.

"And so the plaintiff says that by reason of the matters and things answered, replied and alleged by the said plaintiff to the said various Specifications of Defense filed by the said defendant and each and all of them the said policy sued upon has not been rendered null and void, but that on the

contrary the liability of the said defendant has not been affected or lessened but that the said plaintiff has a right to recover in this action.

Sophia C. Bachmann, by Counsel,
Carl G. Bachmann and Handlan,
Garden and Matthews, Attorneys
for Sophia C. Bachmann."

On November 7, 1929, plaintiff and defendant joined issue on plaintiff's answer in reply to said specifications of defense Nos. I and II and on the general issue plea. On said issues, the jury found for the plaintiff (R. 20) and final judgment order was entered in United States District Court on November 13, 1929. (R. 20.)

RESTATEMENT OF THE CASE.

The statement of the case as contained in brief for petitioner under the heading "Summary of the Case" beginning petitioner's brief, page 2, contains so many misstatements of facts and unwarranted conclusions that we deem it necessary to make a partial re-summary or restatement of the case.

Under paragraph II, page 3, petitioner's brief, petitioner states that the important question before the Circuit Court of Appeals, raised by the petitioner, to be as follows:

"Where there is attached to the New York standard form of fire insurance policy containing a 'Prohibited Articles Warranty' that is, a warranty providing for a forfeiture of the policy if gasoline or other dangerous articles are kept or used on the insured premises) a 'rider' or 'permit' providing that gasoline might be

used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such 'permit' automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building as fuel for the operation of a tenant's moonshine stills, without forfeiting the policy?"

There is no provision in the policy as assumed by Counsel for petitioner, for forfeiture of the policy in any event. The policy provides not for a forfeiture but for a suspension of liability while explosives or gasoline and other substances are kept, used or allowed on the insured premises. This provision is as follows: "Unless otherwise provided by agreement in writing added thereto, this company shall not be liable for loss or damage occurring. . . .

(d) "While illuminating gas or vapor is generated, on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed, on the described premises: fireworks, greek fire, . . . gasoline . . . .". (R. 7.) This is what the petitioner terms the "Prohibited Articles Warranty" as contained in the original policy. It will be noted that in no event is there a forfeiture of the policy provided for. The prohibited use of these articles was afterward changed by the "Rider" above set out (R. 3) and the construction of the "Work and Material Clause" (R. 89) as construed in the Handbook of Rules, Forms and Deposits required by the West Virginia Fire Underwriters Association and the West Virginia Inspection Bureau (R. 88, 89). The Handbook of Rules referred to provides that the granting of a

policy when kept and used for such purposes as hazardous and to do such work and to keep and use such materials as are usual in such occupancies that, "Note:—It is understood that the word 'Materials' as used above includes gasoline and such other materials as are prohibited by the printed conditions of the policy when kept and used for such purposes as are usual to the occupancies permitted."

The above question said to be the important question before the Circuit Court of Appeals and raised in this Court, is not the question raised on the pleadings and the issues joined thereon in the United States District Court nor the issue that was presented to the United States Circuit Court of Appeals (See Appellee's Brief filed by respondent in United States Circuit Court of Appeals, pages 50-61).

The petitioner filed its specifications of defense, hereinbefore set out (R. 12) in which specifications of defense the petitioner alleges, with reference to the alleged "Prohibited Articles Warranty" that, at the time of the fire complained of and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the respondent and her agent or agents and was in violation of the conditions and warranty as contained in said alleged "Prohibited Articles Warranty". This was evidently the interpretation placed upon the clause found in the original policy as amended by what is known as the "Rider" by the petitioner itself in the lower Court. After petitioner failed to prove that the keeping of gasoline, explosives, mash and other highly combustible and inflammable substances

in large quantities was "well known" to the respondent and her agent or agents and was therefore in violation of what petitioner terms the "Prohibited Articles Warranty" and the "Rider" attached thereto, it asked the Court to grant instructions, contrary to the issues raised by its pleadings, the refusal of which it now complains and likewise objected to the instructions given in behalf of the respondent abou which it now complains. Petitioner clearly shifted its position after its failure to prove the allegations that it made with reference to the keeping of gasoline being well known to the respondent or her agents. The first important question presented, as respondent views the matter is: The petitioner, defendant in the District Court, having alleged in its specification of defense that the violation of what petitioner terms the "Prohibited Articles Warranty" was well known to the respondent and her agent or agents and was in violation of alleged "Prohibited Articles Warranty," on which issue was joined was it bound to prove the alleged violation of said warranty to be well known to the respondent and her agent or agents?

Under paragraph III (1) petitioner's brief, P. 3, petitioner summarizes the material provisions of the insurance policy as originally issued, and on page 6 of petitioner's brief under paragraph III (2), petitioner summarizes the effect of the "Rider" or permit added to the original policy and in so doing petitioner assumes at all times in referring to said "Rider" both in its summarization of the argument and its argument, that the privilege granted by the "Rider" permitting the use of the building for bottling of automobile oils, offices and other mercantile purposes not more hazardous, to be more hazardous than the operation of stills. This

question was determined by the jury in favor of respondent.

Petitioner also assumes that from the evidence of Ira P. Huff (R. 125), that the use of "some gasoline" for bottling automobile oils which was being used when petitioner's agents examined the premises was more hazardous than the use of gasoline as fuel and therefore the use of gasoline as fuel was not included in the privileges granted to use gasoline (Petitioner's brief, p. 10, 11). The original policy provides that there shall be no increase of hazard to the knowledge of the insured. This question was determined by the jury in favor of insured.

Under paragraph III (6), petitioner's brief, p. 13, petitioner states that two issues were raised by the pleadings and evidence in the trial in the District Court.

(a) That the keeping and using of gasoline in the insured building for the operation of the tenant's moonshine stills, constitute a clear violation of the "Prohibited Articles Warranty" in the policy irrespective of whether respondent or her agent had any control or knowledge of the tenant's acts.

(b) That the presence and operation of the moonshine stills in the insured building (irrespective of whether gasoline was used in connection therewith) constituted an increase of the fire hazard to the premises in violation of the Increase of Hazard Warranty.

As above shown a reference to respondent's specifications of defense which sets up what petitioner terms the "Prohibited Articles Warranty" (Specifications of Defense, R. 13) the issue was not so narrow as now asserted by petitioner and such an interpretation was not placed upon said alleged "Prohibited Articles Warranty" on the trial of this case. Respondent then al-

leged that, at the time of the fire complained of, and prior thereto large quantities of gasoline, explosive, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, "all of which was well known to the plaintiff and her agent or agents and was in violation of the foregoing condition and warranty." (Reference to said foregoing condition and warranty is to the alleged "Prohibited Articles Warranty" R. p. 14.)

Counsel for petitioner in their brief, page 16, set out Plaintiff's Instruction No. 2, about which petitioner now complains, which instruction as appears from the Record uses the exact words of the petitioner in its specifications of defense, that is, the keeping, using and allowing of gasoline "was well known" to the respondent and her agent.

We desire to further call the attention of the Court to the fact that in the Spring of 1925, while the building was under lease to a tenant by the name of Huff, who was engaged in the business of manufacturing and bottling of automobile oils, the respondent, through her agent advised the petitioner that gasoline and oils were being used in the building. The respondent by its agent inspected the premises and attached to the policy as a "substituted form" the rider or endorsement above referred to. (R. 3, 4.)

Before this rider was attached the occupancy clause in the original policy read as follows:

> "$4,000.00 on four story brick building . . . occupied as produce store, . . . situate at 1312 Main Street, Wheeling, West Virginia." (R. p. 5.)

The rider contained the following occupancy clause:

"$4,000.00 on three story brick building . . . occupied for BOTTLING AUTOMOBILE OILS, offices AND OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS . . . situate at 1312 Main Street, Wheeling, W. Va." R. p. 3.) (Caps ours.)"

SUMMARY OF ARGUMENT.

I

The petitioner is bound to prove its specification of defense substantially as alleged on which issue was joined. It set up in its specifications of defense alleging that it relied on what it terms the "Increase of Hazard Warranty" and the "Prohibited Articles Warranty" and in connection with both of these specifications of defense, it alleged that the violation of said warranties were well known to both the respondent and her agent. Having placed such an interpretation on its contract of insurance on the trial of the case and issue having been joined thereon, petitioner is estopped from taking a position which is inconsistent with the one assumed in the course of the trial. Petitioner is bound to prove the breach of warranty set up by it in the manner alleged.

10 R. C. L. page 699, Sec. 27.
22 C. J. 331.
Shepherd v. Peabody Ins. Co., 21 W. Va. 368.
Logan v. Provident Savings Life Ass. Soc. of N. Y. 57 W. Va. 384, 390.
Chambers v. Northwestern Ins. Co., 64 Minn. 495.

26 C. J. 514, Section 721.
33 C. J. 108, Section 828.
14 R. C. L. 1084, Section 262.
McMaster v. New York Life Ins. Co., 90 Fed. 40, 99 Fed. (C.C.A.) 856.

II

The petitioner, defendant, in District Court, interpreted the "Prohibited Articles Warranty" contained in the original policy as changed by the "Rider" as requiring it, in order to show breach thereof, to prove that the keeping of gasoline was known to respondent or her agent, and so alleged in its specifications of defense No. II (R. p. 13). The case was tried on this issue. Petitioner should not be permitted to assume a different theory in the Circuit Court of Appeals or in this Court from that assumed in the trial Court.

San Juan Light, etc., Co. v. Requenna, 224 U. S. 89, 32 SCt. 399, 56 L. ed. 680;
Melton v. Pensacola Bank, etc., Co., 190 Fed. 126, 111 CCA 166;
Brockenbrough v. Champion Fibre Co., 176 Fed. 840, 100 CCA 310;
General Fireproofing Co. v. Wallace, 175 Fed. 650, 99 CCA 204;
Richmond v. Oregon R., etc., Co. 137 Fed. 848, 70 CCA 378;
Baker v. Kaiser, 126 Fed. 317, 61 CCA 303;
Chicago, etc., R. Co. v. De Clow, 124 Fed. 142, 61 CCA 34;
Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589, 48 CCA 559 (infringement of trade-mark).

Thomas v. Taylor, 224 U. S. 73, 32 SCT 403, 56 L. ed. 673;

Texas etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 SCT 350, 51 L. ed. 553;

Basset v. Erickson Constr. Co., 213 Fed. 810, 130 CCA 468;

Mesa Market Co. v. Crosby, 174 Fed. 96, 98 CCA 70;

Bush v. Ralph Snyder, 100 W. Va. 464, 470, 130 S. E. 807;

Alford v. Kanawha etc., R. Co., 84 W. Va., 570, 100 S. E. 402.

10 R. C. L. p. 701 Section 28.

III

The "Rider" or permit attached to the original policy after the issuance thereof removed from the "Prohibited Articles Warranty Clause" the prohibition against the use of gasoline as contained in the original policy from the "Prohibited Article Warranty Clause" and placed the use of such gasoline within the "Hazardous Warranty Clause," under which latter clause, the petitioner is bound to show that the use of gasoline increased the hazard under the policy issued by the insurer.

This, the petitioner admits it failed to prove or at least it admits that the finding of the facts by the jury settled the question of fact as to whether or not the hazard was increased. (Petitioner's brief pp. 8, 14.)

IV

Petitioner assumes that the use of gasoline, if there were any such use being made at the time of the fire

in the operation of stills, was a greater hazard than the use of gasoline in the operation of bottling automobile oils or other occupancies of like nature. There is no evidence on which to base such an assumption. The mere fact that a business is unlawful does not necessarily involve a greater risk than the conducting of a lawful business.

V

It was not necessary for the "Rider" to include a permit to use gasoline for special purposes in order to make said permit cover any particular use thereof not more hazardous than the bottling of automobile oils or any other occupancies not more hazardous.

VI

The District Court did not err in granting instructions complained of on behalf of the respondent and in refusing to give instructions tendered by petitioner in view of the specifications of defense relied upon by petitioner in the lower Court and in view of the alteration of the original policy by the "Rider" attached thereto.

ARGUMENT.

(a) PETITIONER IS BOUND BY ISSUES JOINED IN TRIAL COURT

The petitioner in its specifications of defense No. 2 (R. 13, 14) in which it sets out the "Prohibited Articles Warranty" alleges that large quantities of gasoline were being used and allowed upon and about the in-

sured premises in violation of said warranty, all of which was well known to the respondent and her agent or agents. This was the interpretation placed upon the "Prohibited Articles Warranty" by the petitioner in the trial Court. Respondent joined issue on this specification of defense, and when the respondent showed the issuance of the policy; that the payments of the premiums had been regularly made up to the time of the fire, and that thereafter proof of the loss occasioned by said fire had been furnished to the Company as stipulated by the policy, then respondent made out a prima facie case. It was then up to the petitioner, if it relied upon a breach of warranty to void said policy and to release it from the payment thereof, to establish its case by a preponderance of the evidence.

> "When the plaintiff shows the issuance of the policy, that the payments of the premiums have been regularly made up to the time of the death of the assured, and that, after the death of the assured, proof of his death had been furnished to company as stipulated by the policy, then this makes a prima facie case, and if the defendant relies upon a breach of warranty or false representation to avoid said policy, and to release it from the payment thereof, it must establish its case by a preponderance of the testimony."
>
> Logan v. Provident Savings Life Ass. Soc. of N. Y., 57 W. Va. 384, 390.

The burden is on the petitioner to prove all matters of affirmative defense set up by it.

> 26 C. J. 514, Section 721.
> 33 C. J. 108, Section 828
> 14 R. C. L. 1084, Section 262.

McMaster v. New York Life Ins. Co., 90 Fed. 40, 99 Fed. (C.C.A.) 856.

Fountain v. Connecticut Fire Ins. Co., 117 Pac. 630.

Harrington v. Hanover Fire Ins. Co., 5 N. Y. S. 417.

St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186.

Hanley v. Aetna Ins. Co., 215 Mass. 425, 102 N. E. 641 Ann Case, 1914-D-53.

Rwy. Mail Assoc. v. Moore 15 Fed. (2-d) 547.

Section 64 of Chapter 125 of the Code of West Virginia, 1923, provides:

"To any declaration or count on a policy of insurance, whether the same be in the form prescribed by the sixty-first section of this chapter or not, and whether the action be covenant, debt or assumpsit the defendant may plead that he is not liable to the plaintiff as in said declaration is alleged. But if in any action on a policy of insurance, the defense be that the action can not be maintained because of failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, and such statement must be verified by the oath of the defendant, his officer, agent or attorney-at-law, to the effect that the affiant believes the matter of defense therein stated will be supported by evidence at the trial."

The petitioner, complying with this provision of the State law alleges that respondent cannot maintain its action because of her failure to perform and comply with and her violation of certain clauses, conditions and warranties contained in the policy sued upon and petitioner specifies the particular clauses, conditions and warranties in respect to which such failures and violations are claimed to have occurred.

To permit petitioner after issue joined and proof taken, to now say that it does not need to prove its allegations, would be to permit it to mislead respondent and the trial Court and now take advantage of its own deception. Such attempts on the part of petitioner to shift its position in an appellate Court is contrary to well settled principles of law.

> "One of the most important results of the rule that questions which are not raised in the Court below cannot be raised in the appellate Court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the Court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review. And the same is true where the parties act upon a particular theory of defense or of opposition thereto."

3 C. J. p. 718-721 and cases there cited—

The special pleas or statements tendered in an action

on an insurance policy are in the nature of Bills of Particulars,

> Seyler vs. British American Assurance Co., 72 W. Va. 120, 77 S. E. 555; Indiana and Ohio Live Stock Insurance Co. 74 W. Va., 244, 81 S. E. 984.

Specifications of defense are notice to plaintiff of the defense that defendant will interpose.

"A direct, specific admission of a fact in a pleading is binding and conclusive on the party making it."

> Clarke vs. Clarke 70 W. Va. 428.

Petitioner, by alleging knowledge on the part of respondent or her agent, compelled respondent to reply thereto, which she did, denying said allegation on the part of petitioner.

> "The effect of a Bill of Particulars is to limit and restrain the plaintiff, on a trial, to the proof of the particular cause or causes of action, therein mentioned."

> 21 R. C. L., Page 482, Section 45.

citing:

> McKinnie v. Lane, 230 Ill. 544, 120 A. S. R. 338.

> "A Bill of Particulars is considered in some respects as an amplification of the declaration; and its object is to inform the defendant of the claim he is called on to defend against" (in the present

case to inform the plaintiff of the defenses that defendant would rely upon) "to effect its object, it must be as certain and convey as much information as a special declaration; and the same is true as to notice of special matters of defense."

21 R. C. L. 480, Section 43.

"A Bill of Particulars becomes evidence as an admission against the party delivering it on the trial of the issue to which it relates, and as such is proper for the consideration of the jury."

2 Ency. of Ev. 422,

citing:

Kenyon v. Wakes, 2 Mees. & W. 764; Lee v. Heath (N. J.), 39 Atl. 729.

"Proof must conform to a Bill of Particulars and pleadings to which they are adjunct."

Gilpin v. Howell, 5 P. St. 41, 45 Am. Dec. 720,
Commonwealth v. Snelling, 15 Pick (Mass.) 321,
Chicago etc., Railroad Co. v. Rovine, 61 Miss. 288,

"When a Bill of Particulars is furnished, it is deemed a part of the declaration, plea or notice to which it relates, and is construed in the same way as though it had been originally incorporated in it."

Starkweather v. Kittle, 17 Wend. (N. Y.) 20.

"A party will not be allowed to contradict his own Bill of Particulars in any material respect."

Hanson v. Smith, 94 Fed. 960.

"Proof must correspond substantially with the pleading of the party introducing it."

33 C. J. 102, Section 819,

Groves v. Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324.
Catlett v. Pac. Ins. Co., 5 Fed. Cases No. 2517,
Simmons v. W. Va. Ins. Co. 8 W. Va. 474.

In an action on a policy on a frame dwelling house, the answer alleged that the assured used and occupied the building insured at the time he placed the policy, and afterwards as a boarding house and hotel, and that the policy was thereby rendered void. No change in the occupancy was alleged. Evidence that the building after the date of the policy was occupied as a hotel with the consent of the defendant was excluded as being different defense from the answer, and one requiring special pleading.

Pierce v. Cohasset Ins. Co., 123 Mass. 572, 573.

"Complying with the rule as in other cases, if there is a variance between the nature and elements of a cause of action as alleged and as proved, it is fatal. It is fatal if a variance exists between the proof and the defense alleged."

Phoenix Ins. Co. v. Lawrence, 81 Am. Dec. (Ky.) 521,

Provident Savings Life Assurance Society v. Bruett, 157 Ala. 540, 47 S. 1019,

New York Life Ins. Co. v. McPherson, 137 Ala. 116, 33 S. 825,

Penna. Mutual Aid Society v. Corley, 2 Penny. (Penna.) 398,

Bankers Loan Assoc. v. Liscow, 47 Neb. 340, 66 N. W. 412,

Needer v. Provident Savings Life Assurance Society, 58 App. Div. 80, 68 N. Y. S. 518.

See also Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 126.

It is a rule of pleading that it is not enough to merely set out a statute or other writing claimed to have been breached but pleader must descend to particulars and show the manner in which it has been breached. This the petitioner did by alleging that large quantities of gasoline, explosives, mash and other highly combus tible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the respondent and her agent or agents and was in violation of the warranty against the keeping, using and allowing gasoline in large quantities upon and about the insured premises. Petitioner in the Circuit Court of Appeals and in this Court now says that its defense based upon the alleged "Prohibited Article Warranty," was that if the tenant, Varisca, was keeping or using gasoline or any other prohibited article upon the premises, there could be no recovery upon the policy, even though the respondent, as owner of the building, knew nothing about the violation of the warranty. In view of the fact that p ti-

tioner attempted to prove that respondent's agent was upon the premises destroyed in order to show that he had knowledge of the operation of the stills and the presence of gasoline and in view of the further fact that petitioner alleged in specifications of defense that the presence of gasoline was well known to the respondent and her agent and also that the increase of hazard caused by the alleged operation of stills was known to the respondent and her agent, it is evident that petitioner did not contend in the trial of the case that there could be no recovery even though the respondent or her agent knew nothing about the violation of the warranty.

The first question, therefore, to be determined, is: Must petitioner prove its specifications of defense substantially as alleged? If so, then it is incumbent upon petitioner to prove knowledge on the part of respondent or her agent, both of the increase of hazard and that the presence of gasoline upon the insured premises prior to or at the time of the fire increased the hazard. It must be noted that respondent replied to petitioner's specifications of defense (R. 15) saying that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said specifications; that neither she nor her agent or agents had any knowledge or control over or concerning any of said facts, charges and allegations, on which issue was joined by petitioner without objection.

(b). PETITIONER IS BOUND BY THEORY ON WHICH CASE WAS TRIED IN TRIAL COURT.

The petitioner, in filing its specifications of defense, placed its own interpretation upon the "Prohibited

Articles Warranty" contained in the original policy as altered by the "Rider" herein set out, as requiring it in order to show breach thereof to prove that the keeping of gasoline was known to plaintiff or her agent. The case was tried on this issue and the trial Court based its instructions thereon. The petitioner, perceiving that it had failed to prove its specifications of defense as set up by the breach of the "Prohibited Articles Warranty" asked the trial Court to submit to the jury instructions contrary to its own interpretation of its insurance agreement as set up in said specifications of defense. And it maintained in the Circuit Court of Appeals and maintains in this Court that it is entitled to recover whether or not the respondent or her agent had knowledge of the keeping, storing and using of gasoline on the insured premises.

It is the general rule that where a party to an appeal has assumed an attitude in the lower court as to the theory of his case, or as to questions of law or fact upon which the theory of his case is based, he is estopped to assume any other or inconsistent position in the appellate Court, but must stand or fall on the theory which he first adopted.

Sutherland v. Sutherland 102 Ia. 535, 63 ASR 477 and note,

Tarbul v. Royal Ex. Shipping Co., 110 N. Y. 170, 6 A.S.K. 350,

Morrison v. Atkinson, 16 Oka. 571, 8 Ann. Cases 486 and note, 85 Pac. 472.

See Knoop v. Kelsey, 102 Mo. 291, 22 Ann. St. Reps. 777.

10 R. C. L. 701. Sec. 28.

San Juan Light etc. Co. v. Requenna 224 U. S. 89—32 S. C. T. 399.

Melton v. Pensacola Bank etc. Co. 190 Federal 126, 111 CCA 166.

Brockenbrough vs. Champion Fibre Co. 176 Fed. 840,—100 CCA 310.

(c) EFFECT OF "RIDER"

Even if we concede that petitioner is not bound to prove its specifications of defense substantially as alleged by it, still the petitioner cannot recover.

The insurance contract in so far as this case is concerned is narrowed down to the following provisions of the policy:

> "$4,000.00 on the three story brick building, ... occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS." (R. p. 3.) (Caps ours.)
>
> "And for present and other occupancies NOT MORE HAZARDOUS and to do such work and keep such materials as are usual in such occupancies." (R. p. 3.) (Caps ours.)
>
> "It is understood that the word 'materials' as used above, INCLUDES GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted". (R. p. 89.) (Caps ours.)
>
> "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring . . . (b) While the HAZARD IS INCREASED by any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED and (d) while . . . there is kept, used or allowed on the described

premises . . . . . gasoline . . . . . ." (R. p. 7) (Caps ours.)

Construing the above provisions as a whole the alleged "Prohibited Articles Warranty" means the following:

> The Company will not be liable if GASOLINE is kept, used and allowed on the insured premises; provided, however, that such forfeiture shall not occur if GASOLINE be kept, and used while the insured premises are being used for bottling automobile oils, offices, or other mercantile purposes NOT MORE HAZARDOUS or for present and other occupancies NOT MORE HAZARDOUS.

It is admitted by petitioner on page 8 of its brief that in substance the "Prohibited Articles Warranty" has been changed as herewith submitted, save and except, the petitioner does not include the following provision:

> "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS" (R. p. 3.) (Caps ours.)

It is therefore respectfully submitted that the "Prohibited Articles Warranty" was so changed that the only way it could be effective would be when the insured building was occupied for a MORE HAZARDOUS PURPOSE than the bottling of automobile oils, offices and other mercantile purposes.

We think that the "Prohibited Articles Warranty" as thereby changed to be effective is solely dependent

upon an INCREASE OF THE FIRE HAZARD because it can only mean that

> GASOLINE could not be kept, used or allowed in any occupancy not more hazardous.

Consequently, if the "Prohibited Articles Warranty" as changed by the "Rider" is dependent upon an increase of the fire hazard we are then face to face with two inconsistencies and ambiguous provisions of the policy:

> First, The Company shall not be liable if gasoline shall be kept, used or allowed, provided however, the hazard is increased, and
>
> Second, If the hazard is increased by any means within the control or knowledge of the insured.

Both provisions relate to an increase of hazard and if, assuming for the purpose of argument, the hazard was increased by the tenant at the time of the fire, that increase of hazard had to be within the control or knowledge of the appellee.

Mr. Justice Sutherland in the case of Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U. S. 167, said:

> "The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

As in the present case, the petitioner employed the language contained in the policy, the rider and the

typewritten part of the occupancy clause contained in the rider. Is the petitioner now entitled to have these inconsistent provisions of the policy construed in a light favorable to it, or must it be held to the strict rule of construction, namely, that the meaning of its own words should be resolved against it?

We submit therefore that the holding of the U. S. Circuit Court of Appeals in this connection was correct.

There is no question but that the petitioner assumed the risk on the insured building which at the time the rider was attached to the policy was occupied and being used by a tenant who was using gasoline in the carrying on of his business of bottling automobile oils. This tenant could keep and use gasoline in unrestricted quantities or amounts. The rider did not restrict the amount. The agent for petitioner who inspected the premises saw and was advised gasoline was being used by the tenant. It was the intention of petitioner to continue the insurance on the building after this information came to it because it later prepared and attached to the policy the rider containing the occupancy clause which in so far as this occupancy was concerned negatived what is called the "prohibitive articles warranty" contained in the printed policy.

The petitioner; however, agreed not only to assume this risk of gasoline being kept and used in unrestricted quantities and amounts for the purpose of bottling automobile oils, but it agreed to assume the risk connected with any other mercantile purpose not more hazardous. In other words, petitioner assumed the

risk for any other purpose providing it was not more hazardous than bottling automobile oils. The wording of the occupancy clause in the rider is as follows:

> "occupied for bottling automobile oils, offices and OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS." (R. p. 3.) (Caps ours.)

The printed provision of the policy known as the "Prohibitive Articles Warranty" is as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) While . . . there is kept, used or allowed on the described premises . . . gasoline . . ."

It can be readily seen that while the printed policy prohibited the keeping, using and allowing of gasoline, the occupancy clause in the rider was intended to and did permit it for any purpose not more hazardous than bottling automobile oils.

Several months after the rider was attached to the policy the tenant who was manufacturing automobile oils terminated his tenancy and the building was rented to a new tenant.

How far could this new tenant go in the use and occupancy of the insured building without violating the policy? Could he also manufacture automobile oils? Could he operate a still for the purpose of making distilled water to be used in his manufacturing process? If he could, such operation and the keeping and using of gasoline for that purpose would not be a violation of the policy. But it is claimed, and assuming for

the purpose of argument, that the tenant was operating stills for the purpose of making liquor at the time of the fire, and that certain quantities of gasoline were on the premises, if the tenant at the time of the fire could carry on the business of manufacturing automobile oils, then under the occupancy clause in the rider he could carry on any other business in the building, legal or illegal, providing its purpose was not more hazardous. Whether the keeping and using of gasoline for the purpose of operating stills, is more hazardous than the keeping and using of gasoline for the purpose of bottling automobile oils, is a question of fact. This fact was passed upon by the jury. Petitioner's Instruction No. 5 which was incorporated as part of the Court's charge to the jury, is as follows:

> "The court charges the jury that if you believe from the evidence that the fire hazard to said property was being increased as alleged in defendant's specification of defense, at and prior to the time of the fire complained of, by any means within the knowledge or control of the plaintiff, Sophia C. Bachmann or her husband, Charles F. Bachmann, INCLUDING ANY DANGEROUS USE OR OCCUPATION OF SAID BUILDING, which in your judgment increased the fire hazard in violation of the terms of plaintiff's policy, and that such increase in hazard, if any, caused or contributed to the fire and loss which occurred on the 27th day of December, 1925, then you must find for the defendant." (R. p. 150.) (Caps ours.)

The question as to whether the hazard was increased

during the last occupancy having been submitted to the jury and the jury having found for the respondent clearly the purpose for which the building was being used at the time of the fire was not more hazardous.

The jury having found that the use being made of the premises was not more hazardous than was permitted by the policy. The petitioner cannot now claim that the purpose for which the building was being used at the time of the fire was more hazardous.

It must be remembered the petitioner defended under two provisions of the policy as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring:
>
> (b) While the hazard is increased by any means within the control or knowledge of the insured, or,
>
> (d) While . . . there is kept, used or allowed on the described premises . . . gasoline." (R. p. 7.)

Consequently it was the duty of the petitioner to prove first, that the hazard was increased within the knowledge and control of the insured. This it did not do. Whether or not the respondent or her agent had control or knowledge that the hazard had been increased by the operation of stills was a question of fact and the Judge submitted this question to the jury when he incorporated in his charge to the jury Plaintiff's Instruction No. 3, which was as follows:

> "The jury are charged by the Court that the fact alone that Bill Varisca either alone or with any associated may have operated liquor stills

upon the insured premises and that the fire which destroyed said premises was caused by or through the operation of said stills does not relieve the defendant insurance company from liability under its policy sued upon in this case but in order that the said insurance company may be so relieved it is incumbent upon said insurance company to prove to your satisfaction by a preponderence of the evidence that the said plaintiff, Sophia C. Bachmann, or her agent, Charles F. Bachmann had control or knowledge of the said liquor still operations and if said plaintiff and/or her said agent did not have such control or knowledge then notwithstanding the fact that said stills were so operated your verdict should be for the plaintiff." (R. p. 143.)

This question having been submitted to the jury and the jury having found that the fire hazard was not increased within the control or knowledge of the respondent, there can only be one conclusion and that is the petitioner failed to sustain the first grounds of its defense, namely that the hazard was increased within the control or knowledge of the respondent.

Second, it became the duty of the petitioner to prove its second ground of defense, namely, that gasoline was kept, used and allowed in the insured building. The evidence in so far as gasoline being found on the premises is concerned is very conflicting. Two prohibition officers who testified on behalf of the petitioner testified that they found a number of five-gallon cans containing gasoline on the first floor of the building the second day after the fire and that one or two of the compressor tanks connected with the stills also contained gasoline. This evidence was contradicted

by twenty-three witnesses who testified for the respondent and who all testified that they visited the building the day after the fire and one day before the prohibition officers said they found gasoline in the building. Many of these witnesses unqualifiedly testified there was no gasoline in the building; others, that they were in a position to see if any had been there, but did not see any. In addition to the above a number of the city firemen who attended the fire and two ex-chiefs of the Fire Department of the City of Wheeling who were present at the fire, all testified they did not see any gasoline and if there had been any there at the time of the fire it would have burned or exploded, and that the fire was so hot that if there were gasoline in the building it could not have stood the intense heat. Furthermore the jury could have found for the petitioner, if it believed gasoline was kept, used or allowed on the premises under "Plaintiff's Instruction No. 6" which the Court incorporated in the charge to the jury and which is as follows:

> "The jury are charged by the Court that the evidence and testimony in this case now before you gentlemen of the jury discloses and establishes that the Defendant company issued and delivered to the plaintiff, Sophia C. Bachmann, the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefore; that the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date, the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss not less than $3,784.49 the amount of said policy; that thereafter duly and seasonably the plaintiff made out

and filed with the defendant the required Proofs of Loss. Under these circumstances, you are charged by the Court that unless the defendant has proven by a preponderence of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased and/or THAT QUANTITIES OF GASOLINE WERE KEPT AND USED UPON SAID PREMISES your verdict shall be for the plaintiff." (R. p. 145.) (Caps ours.)

But the jury settled this question of fact by finding for the respondent. Consequently, the petitioner failed to prove its second ground of defense.

If the appellant failed to prove both grounds of its defense, which we submit it failed to do, and the jury having found for the respondent, then there can be no question but that the petitioner is liable.

PARTS OF INSURANCE CONTRACT INVOLVED

The Printed Policy

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring . . . .

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED, or

(d) . . . THERE IS KEPT, USED OR ALLOWED on the described premises . . . GASOLINE . . ." (Printed Policy.) (R. p. 7.) (Caps ours.)

The "Substituted Form" or Rider

"Four thousand dollars on three-story brick building . . . occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS.

"Privileges Granted . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such MATERIALS as are used in such occupancies." ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

Hand Book of Rules West Virginia Fire Underwriters Association

"Privilege . . . for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies.

"Note: It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Hand Book of Rules West Virginia Fire Underwriters Association.) (R. p. 88, 89.) (Caps ours.)

When this substituted form or rider was added to the policy it entirely changed the printed provision of the policy known as the "Prohibited Articles Warranty" in so far as the keeping, using and allowing of gasoline was concerned, in that it permitted the keeping, using and allowing of those prohibited materials mentioned in the "Prohibited Articles Warranty" FOR THE PRESENT OR OTHER OCCUPANCIES NOT MORE HAZARDOUS; that is, it struck out

the printed provision (d) in the "Prohibited Articles Warranty" and read into the policy in its place, the right to keep, use and allow the MATERIALS needed, in unrestricted quantities or amounts for BOTTLING AUTOMOBILE OILS AND OTHER PURPOSES NOT MORE HAZARDOUS. There can be no doubt that it was the intention of the parties, particularly of the petitioner, to permit the keeping, using and allowing of the prohibited materials mentioned in section (d) "Prohibited Articles Warranty" for the purpose of bottling automobile oils and OTHER OCCUPANCIES NOT MORE HAZARDOUS when it attached this rider to the policy.

If the premises were to be occupied other than for bottling automobile oils, that occupancy was not to be MORE HAZARDOUS than bottling automobile oils, that is, it was not to be an occupancy which increased the fire hazard.

It must be remembered that under the rider OTHER OCCUPANCIES were permitted, so long as they were NOT MORE HAZARDOUS than the hazard incident to bottling automobile oils, that is, so long as the other occupancies did not increase the fire hazard.

The petitioner intended, when it attached this rider to the policy, that gasoline and other prohibited articles could be kept, used and allowed but the fire hazard should not be increased during other occupancies by any means within the knowledge and control of the insured.

The "Hand Book of Rules" required to be filed in the office of the Commissioner of Insurance of the State of West Virginia (R. p. 88) and in use by the West Virginia Fire Underwriters Association and which was

used by the fire insurance companies doing business in West Virginia in 1925, defines what the term MATERIALS means as used in the rider referred to. On page 73 of this book is found the following:

> "Privilege for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 89.) (Caps ours.)

> "Note: It is understood that the word MATERIALS as used above, includes GASOLINE, and such other materials as are prohibited by the printed provisions of the policy when kept and used for such purposes as are usual to the occupancies permitted." (R. p. 88.) (Caps ours.)

The petitioner by its own interpretation of the word MATERIALS as used in the rider admits that it includes GASOLINE and the other prohibited materials mentioned in the printed provisions of the policy.

If it was the intention of the petitioner to free itself from liability providing prohibited materials were kept, used or allowed in occupancies that were more hazardous than permitted under the rider, then it should have stated in the rider that if any of the prohibited materials are kept, used or allowed in other occupancies that are more hazardous the Company would not be liable. This it did not do and it is very evident that it therefore relied upon the "Increase of Hazard Warranty" of the printed policy. (R. p. 7.)

That the rider completely changed the printed conditions of the policy there can be no doubt. A com-

parison of the provisions of the rider under PRIVILEGES GRANTED (R. p. 3) with the printed provisions of the policy (R. p. 7) will disclose just what was intended. The printed policy provides:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring
> (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered, in whole or in part by this policy." (R. p. 7.)

The rider contains the following:

> "PRIVILEGES GRANTED . . . for other insurance without notice until required." (R. p. 3.)

Clearly the printed provision of the policy prohibited other insurance while the rider permitted additional insurance.

Again the printed provision of the policy provides:

> "(c) While mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days." (R. p. 7.)

The rider contains the following:

> "to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or ad-

jacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions."

So here again the printed provision of the policy prohibited alterations and repairs beyond a period of fifteen days while the rider permitted alterations and repairs to be made for sixty days at any one time. (R. p. 3.)

Again the printed provision of the policy provides:

"(f) While a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days." (R. p. 7.)

The rider contains the following:

"to be vacant not exceeding sixty consecutive days; to be unoccupied not exceeding sixty consecutive days." (R. p. 3.)

Here again the printed provision of the policy prohibited the premises to be vacant or unoccupied for not more than ten days while the rider permitted it to be vacant and unoccupied for sixty consecutive days.

Again the printed provision of the policy provides:

"(d) While illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary not withstanding) there is kept, used or allowed on the described premises; fireworks, greek fire, phosphorous, explosives, benzine, GASOLINE, naph-

tha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. p. 7.) (Caps ours.)

The rider contains the following provision:

"To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than ten feet from *artificial* light, except incandescent electric light . . . and FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 3.) (Caps ours.)

Here again section (d) has been completely changed.

It will be noted that the provisions of the printed policy, namely, sections (a), (c), (d) and (f), were all changed by the rider, while sections (b), (e) and (g), of the printed policy were not destroyed by the rider.

In other words, if the policy was redrafted in this connection, it would read substantially as follows:

"Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring:

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED; or

(e) If the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five

A. M. or while it ceased to be operated beyond a period of ten days; or

(g) By explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." (R. p. 7.)

WHEN THE RIDER IS ADDED TO THE ABOVE, THE POLICY IS COMPLETE.

The petitioner so construed the policy in this connection, because when we read its "Specifications of Defense" we find ITS OWN PLEADINGS alleges that the respondent or her agent WELL KNEW that GASOLINE, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon the insured premises.

Petitioner's "Specification of Defense No. 2" is as follows:

"The defense says that at the time of the fire complained of; and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises ALL OF WHICH WAS WELL KNOWN TO THE PLAINTIFF AND HER AGENT OR AGENTS, and was in violation of the foregoing condition and warranty." (R. p. 14.) (Caps ours.)

The petitioner cannot now complain or have a construction placed upon the policy in this case which is favorable to it, in view of the fact that the petitioner itself is responsible for the wording contained in the policy.

There is abundance of authority holding that where doubts arise as to the proper construction of clauses in insurance contracts that view which is most favorable to the insured must be adopted.

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company 263 U. S. 167, Mr. Justice Sutherland said:

> "The language employed is that of the Company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

FIRST NATIONAL BANK v. HARTFORD INSURANCE CO. 95 U. S. 673, 678-679;

THOMPSON v. PHOENIX INSURANCE CO. 136 U. S. 287, 297;

IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY 151 U. S. 452, 462.

> "An insurance policy will be construed in a manner most favorable to the insured."

MISSOURI STATE LIFE INSURANCE CO. v. GUESS. 17 Fed. (2) 450 AND CASES THERE CITED.

> "Courts do not favor forfeiture and where doubts arise will adopt construction of policy most favorable to insured and which will prevent annulment."

RAILWAY MAIL ASS'N v. MOORE. 15 Fed. (2) 547.

"It is well settled law that where doubts arise as to the proper construction of clauses in insurance contracts, that view of them must be adopted which is most favorable to the insured, and which will prevent a forfeiture of his rights under the policy. FORFEITURES ARE NEVER FAVORED BY THE COURTS." (Caps ours.)

BOOHER v. FARMERS' MUTUAL FIRE ASSOCIATION 91 W. Va. 468.

"Contracts of insurance are to be construed most strongly against the insurer and in favor of the insured."

SHINN v. W. VA. INS. CO. 104 W. Va. 353.

"If the language of a forfeiture clause in an insurance policy is susceptible of two constructions, the one more favorable to the insured is to be adopted."

BOLING v. CONTINENTAL INS. CO., 86 W. Va., 165.

In order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the respondent, the petitioner must, under the terms of the policy, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE respondent or her agent. This it failed to do.

It cannot be doubted that, under the rider, any other occupancy NOT MORE HAZARDOUS was permitted. That, undoubtedly, means any occupancy which did not increase the fire hazard. Therefore, the

policy and rider present two separate clauses relating to increase of hazard. One providing that:

> Gasoline shall not be kept, used or allowed in an occupany where the hazard is increased.

And the other providing that:

> If the HAZARD IS INCREASED BY ANY MEANS, it must be within the knowledge or control of the insured.

It is very readily apparent that these two provisions relate to an increase in the fire hazard. And if there was an increase in the fire hazard at the time of the fire by the tenant then occupying the building WHICH WAS NOT PROVEN in order to excuse the petitioner from liability, the petitioner must, under the terms of the policy and rider, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE INSURED. THIS WAS THE PETITIONER'S OWN CONTENTION AND POSITION IN THE TRIAL COURT as shown by its "Specification of Defense No. 2" herein referred to (R. p. 13).

Clearly whether or not the hazard was increased within the knowledge and control of the respondent, was a question of fact for the jury to decide and being a question of fact overwhelmingly supported by a preponderence of the testimony, the jury found for the respondent.

The Court in the case of ROYAL EXCHANGE ASSURANCE COMPANY v. THROWER (240 Fed. 811) said on page 816,

"It is this language 'WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED' that differentiates policies like this from many policies as to which it has been held that the act of the tenant is the act of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 816, Affirmed 246 Fed. 768.

The following is quoted from the opinion of the Court in the above case on pages 814, 815:

"That the insured ought to have known, must have known, should have known, is not enough. The insured must have knowledge of the particular use to which the building was being put by the tenant. The language is 'any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED.' To control the matter it would seem to be necessary that the insured should have had some knowledge of what was being done in the building. It does not seem that an owner can be held to the duty of controlling that of which he does not know. The duty to control involved, reasonably and fairly, some knowledge of the hazardous use of the building; otherwise the forfeiture would be worked simply because the insured was the owner of the building, and the people who caused the hazard were his tenants. The language of the policy would be given no effect, that the forfeiture should result from the increased hazard by means within the CONTROL OR KNOWLEDGE of the insured. There is abundant authority for holding that, where there was language like this in the

policy, the owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 814, 815. Affirmed 246 Fed. 768.

In the case of FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION, the Court held:

"Where owner of dwelling house rented building for dwelling house purposes without knowledge that tenant was operating a STILL therein POLICY OF FIRE INSURANCE COVERING BUILDING WAS NOT AVOIDED BECAUSE OF INCREASE OF HAZARD OR CHANGE OF OCCUPANCY BY REASON OF OPERATION OF STILL BY TENANT." (Caps ours.)

FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION 278 PAC. (MONT) 509 (June, 1929).

In the case of COLKER v. CONNECTICUT FIRE INSURANCE COMPANY the Court held:

". . . where the insured leased part of his building to a tenant FOR STORAGE PURPOSES, the insurer was not released from liability or loss through fire by fact that tenant, without knowledge or consent of insured, operated a still on premises; PROVISION FOR AVOIDING POLICY BECAUSE OF INCREASED HAZARD NOT RELIEVING INSURER FROM LIABILITY IN SUCH CASE." (Caps ours.)

COLKER v. CONN. F. INS. CO., 290 S. W. (Ky.) 1073.

In the case of RAGLEY v. NORTHWESTERN INSURANCE COMPANY the Court held:

". . . that where owners renting house insured for dwelling house purposes had no cause to believe that dwelling was used for manufacture of liquor THEY WOULD NOT BE CHARGEABLE WITH MANUFACTURE OF LIQUOR AT THE TIME OF FIRE, SO AS TO RENDER POLICY VOID, even though such manufacture was such as might, as against tenant, be regarded as one of the principal uses of the house." (Caps ours.)

RAGLEY v. NORTHWESTERN INS. CO., 276 Pac. (Wash.) 537.

(d) PETITIONER ASSUMES THAT THERE WAS AN INCREASE OF HAZARD.

Even if an unlawful business was being conducted on the premises still the respondent is not barred from recovery unless there is evidence to show that the fire hazard was increased to the knowledge or with the consent of the owner of said building. It is incumbent on petitioner to affirmatively prove that the increase of hazard made by tenant was with the consent or knowledge of the owner or her agent.

Merrill vs. Ins. Co. 23 Fed. 245.

The purpose of a provision in a fire policy defeating recovery because of increased hazard is because increased peril may cause fire, and if loss ensues from

cause foreign to increase of hazard, there is no casual connection between hazard and fire, and there can be no failure of recovery.

Northwestern Insurance Co. vs. Morris 165 N. E. (Ohio) 506.

The fact that the building was leased and the tenant, without the consent or knowledge of the insured, operated still on premises, does not relieve the insurer from liability in such a case.

Colker v. Conn. Fire Insurance Co., 290 S. W. (Ky.) 1073.

Ragley v. N. W. Ins. Co. 276 (Pac.) Wash. 537.

(e) RESPONDENT'S INSTRUCTIONS COMPLAINED OF.

"DEFENDANT'S INSTRUCTION NO. 8."

Petitioner particularly complains of part of respondent's instruction No. 8 (R. 146). which is as follows:

"You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the un-

Contradicted evidence contained gasoline

The petitioner objects to the giving of this Instruction in its entirety, and assigns the following particular grounds as objections thereto:

1. Because it charged the jury that the said policy was in full force and effect upon December 27, 1925. (R. 161.)

2. Because it required the petitioner to prove control or knowledge on the part of respondent as to any moonshine stills or gasoline upon the insured premises. (R. 161.)

3. Because it charged the jury that the petitioner was estopped from avoiding liability on the policy because quantities of gasoline had been kept and used upon the premises following the issuance of the rider on the policy permitting the bottling of automobile oils. (R. 161.)

Petitioner's third objection involves an interpretation of the rider attached to said policy. This rider and its effect has been heretofore fully discussed. The evidence shows that the agent knew of use of gasoline when rider was issued.

The issuance of a policy with knowledge, actual or constructive, of the insured's use in his business of gasoline, contrary to a provision of the policy waives the prohibition.

4 Crouch on Ins. 3371.

Where the agent of a Fire Insurance Company, well knowing that petroleum oil is kept on the premises by the insured, makes out and delivers to him a policy containing a condition that the same shall be void if petroleum is kept on the premises, and receives premium

for the policy, his company is estopped from claiming that the policy is void for breach of the condition.

Kruger v. Western F. Ins. Co., 13 Pac. (Cal.) 156.

To the same effect see Faust v. Ins. Co., 64 N. W. (Wis.) 383; Globe v. Rutgers Fire Ins. Co., 113 N. E. (Ind.) 425; Fraim v. Fire Ins. Co., 32 Atl. (Pa.) 613, L. R. A. 1917—C, 284.

In view of instructions granted on behalf of the petitioner, to-wit, Instructions Nos. 2, 5 and 7, it is plain that the Court simply meant to say in this Instruction (and the jury could not have misunderstood the meaning of the Court), that the petitioner was estopped from avoiding the policy because of the fact that quantities of gasoline were kept and used upon the premises under what is known as the prohibited warranty contained in said policy under Clause (d), lines 44 to 51, inclusive. (R. 7.)

The Court, in granting "Defendant's Instruction No. 7" (R. 151) says that it is not incumbent upon the Insurance Company to prove beyond a reasonable doubt that the respondent or her husband, Charles F. Bachmann, had knowledge or notice of any condition prevailing in the insured building, as alleged in "Defendant's Specifications of Defense" at and prior to the time of the fire, which may have increased the fire hazard of the insured premises and in "Defendant's Instruction No. 5," (R. 150) the Court tells the jury that if they believe from the evidence that the fire hazard to said property was being increased as alleged in "Defendant's Specifications of Defense" by any means within the knowledge or control of the plaintiff, or her

husband, Charles F. Bachmann, including any dangerous use or occupany of the building which increased the fire hazard in violation of the terms of the respondent's policy, then they must find for the petitioner, and in "Defendant's Instruction No. 2" (R. 149) the Court tells the jury that if they believe that respondent's husband, Charles F. Bachmann, had knowledge or notice of the presence or use therein of any of the articles prohibited by the respondent's policy then such knowledge or notice should be imputed to the respondent, Sophia C. Bachmann.

Petitioner alleges in its "Specifications of Defense" that the use of gasoline did increase the fire hazard Paragraph (c). (R. p. 14.) Therefore, the jury were permitted to consider the presence and use of gasoline as increasing the fire hazard as contained in "Defendant's Instruction No. 5," granted by the Court.

The petitioner claims in its brief that the fire hazard was increased by reason of keeping gasoline for a purpose other than that permitted. If this be so, then under the terms of the policy, and under the allegations made by the petitioner in its specifications of defense, it is incumbent upon petitioner to show that respondent or her agent or agents had control or knowledge of such keeping of gasoline. This issue is fairly submitted to the jury by the instructions of the Court.

Let us assume for the sake of the argument that the Court gave a wrong reason in "Plaintiff's Instruction No. 8" as to estoppel of petitioner, still the instructions as a whole correctly state the issues and are based upon the evidence introduced at the trial of the case. Said instruction, therefore, is not prejudicial to the petitioner.

Petitioner in its brief page 16, sets out Plaintiff's Instructions No.2 (R. 142-3), Plaintiff's Instructions No. 4 (R. 144) and Plaintiff's Instructions No. 10 (R. 147). Petitioner's objection to these instructions is that they require petitioner to prove by a preponderence of the evidence that the keeping, using and allowing of gasoline, explosives, mash and other highly combustible substances was well known to the respondent or her agent. All of these instructions were based upon the issues raised by petitioner in its specifications of defense, and upon the interpretation of the effect of the "Rider" attached to the original policy permitting the use of gasoline as made by the petitioner when filing said specifications of defense. The Record does not disclose that any particular grounds of objection were made to any of these instructions at the time they were given to the jury.

This issue is fairly submitted to the jury by the instructions of the Court.

DEFENDANT'S INSTRUCTIONS NOS. 1, 1A, 1B, 1C, 3, 4 and 6 (R. 148-150). Refused.

Instruction No. 1 is bad because:

1. It would make the respondent liable for the acts of a wilful trespasser in temporarily taking gasoline upon the premises.

2. Said instruction is contrary to petitioner's specification of defense and would tell the jury that defendant below would not be liable even though plaintiff below or her husband, Charles F. Bachmann, had no actual knowledge of the presence of gasoline upon the insured premises.

3. Because it entirely ignores the provision contained in the "Rider" attached to the original policy and which permitted use of gasoline.

It is an elementary rule of law that instructions must be based upon the pleadings and evidence. Instructions must be applicable and limited to the issues raised by the pleading.

U. S. v. Dashiel, 4 Wall. 182, 185, 18 L. Ed. 319.

Union Pac. R. Co. v. James, 163 U. S. 486, 490, 41 L. Ed. 236.

Ins. Co. v. Piaggio, 16 Wall. 378, 21 L. Ed. 358.

Hom[illegible]enefit Assoc. v. Sargent, 142 U. S. 691, 700, 35[illegible] Ed. 1160.

Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 287, 41 L. Ed. 160.

Unless the warranty clause so provides, the policy will not be forfeited by the act of a third person not under the control of the insured.

32 C. J. 1296, Section 526.

"The casual use of camphene and friction matches by workmen employed about the premises, without the knowledge of the insured, and contrary to his orders, is no violation of a proviso that they shall not be kept, used or sold. A use, to work a forfeiture must be a use known to and permitted by the insured."

1 May on Ins. (4th Ed.) Section 241, citing:

Farmers and Mechanics Ins. Co. v. Simmons, 30 Pa. St. 299.

White v. Mutual Fire Ins. Co., 8 Gray (Mass.) 566.

Sanford v. Mechanics Mutual Fire Ins. Co., 12 Cush. (Mass.) 541.

"The occasional use of articles denominated hazardous or the occupation of the premises insured for purposes called hazardous, in the conditions annexed to a policy will not avoid the policy if such use and occupation appertain to the general subject matter of the risk."

1 May on Ins. (4th Ed.) Section 241, citing:

Merchants & Manufacturers Ins. Co. v. Wash. Ins. Co. 1 Handy (Ohio) 181.

In view of the above authorities, the above instruction tendered by the defendant below, which entirely ignores the rider attached to the policy, makes the instruction bad, and the Court correctly refused it.

"At the date of the issue of a fire insurance policy, the premises were unoccupied. The printed part of the policy provided that it should become void if benzine, gasoline, etc., or other explosives should be kept or used on the premises. These were the only uses of premises prohibited by the policy as hazardous. A written slip, attached to and made a part of the policy, provided that the premises were 'privileged to be occupied for hazardous or extra-hazardous purposes.' Held, that there was an inconsistency or want of harmony between the printed and written part of the policy, and that the latter must control; also that the use of the premises as a paint factory, in which benzine and gasoline were kept and used

in the manufacture of paints, was permitted by the written part of the policy."

Sol Smith Russell v. Manfg. & Bldrs. Fire Ins. Co. of N. Y., 50 Minn. 409.

The policy provides that extra hazardous use may be made of the building insured without the policy being affected, for it is provided that the effect of the policy will be suspended in the event the hazard be increased by means within the control or knowledge of the insured. If the insured were ignorant of it, although it was a matter which she might have controlled had she known it, the policy is not affected. Or, although she knew of it, yet if it was a thing beyond her control, neither is it affected. Such seems to be the reasonable construction of the language as setting forth the intention of the parties.

North British Ins. Co. v. Union Co., 87 S. W. (Ky.) 285.

The use of prohibited articles or the keeping or storing of them must be permanent or habitual in order to violate a policy prohibiting them.

Swift v. Patrons Ins. Co., 125 Me. 255, 132 Atl. 745.

Where the policy provides that this entire policy unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . . if there be kept, used or allowed on the above-described premises . . . gasoline and that it is understood . . . that any such breach or violation shall not be considered as avoiding the policy or any part thereof unless such breach or

violation has contributed to bring about the destruction of the property hereby insured,' the liability of the insurer thereunder resulting from a fire caused by gasoline on the premises is not defeated unless the gasoline was kept, used, or allowed upon the insurd premises with some degree of permanency, as distinguished from a mere casual deposit or a mere temporary bringing of the gasoline on the premises.

19 Cyc. 736,
Springfield Fire & Marine Ins. Co. v Wade (1902) 95 Tex. 598,
68 S. W. 977,
58 L. R. A. 714,
93 Am. St. Rep. 870,
London & Lancashire Fire Ins. Co. v. Fisher,
92 Fed. 500,
34 C. C. A. 503,
14 R. C. L. 1111,
13 Ann. Cas. 532,
19 Ann Cas. 419.

"It was therefore error to charge that 'where the loss by fire of the property insured directly resulted from a temporary violation of a condition in a policy of insurance such as keeping, using or allowing gasoline or other inflammable material on the premises, the insurer would not be liable."

Sandersville Oil Mill Co. v. Globe Ins. Co.,
124 S. E. 728,
32 Ga. (App.) 722.

Defendant's other instructions refused are bad for the same reasons above mentioned as to the refusal of the petitioner's instructions No. 1. In addition there

is no evidence to support the statement therein contained that some other person or persons by and with the knowledge and consent of the tenant Varisca, kept, used or allowed gasoline upon the premises for the purpose of operating moonshine stills or for any other purpose not permitted by the policy.

"DEFENDANT'S INSTRUCTION NO. 1-B (R. 148)", REFUSED.

In addition to the reasons given under defendant's instruction No. 1, this instruction is bad because there is not a scintilla of evidence to show that some other person or persons by and with the knowledge and consent of Bill Varisca, kept, used or allowed gasoline upon the insured premises. There is no evidence that the respondent consented to use of or had knowledge that said Bill Varisca kept or used gasoline upon said premises and there is absolutely no evidence that respondent had knowledge or consented to some other person or persons to keep, use or store gasoline upon said premises as suggested in said instruction.

"DEFENDANT'S INSTRUCTION NO. 3." (R. 150), REFUSED.

In addition to other reasons given, under Instruction No. 1 and petitioner's other instructions previously referred to for refusing it, instruction No. 3 (R. 150) singled out and emphasized the fact that gasoline alleged to have been kept, used or allowed on said premises, need not have caused or contributed to the fire in question. It is not error to refuse an instruction which singles out particular circumstances and omits all reference to others of importance.

Grand Trunk R. Co. v. Ives 144 U. S. 408.
Rio Grande Western R. Co. v. Leak 163 U. S. 280.

The singling out of a particular matter and emphasizing it by a special instruction is apt to mislead the jury.

Vertovich v. U. S. 205 U. S. 86, 92.

An instruction which singles out and causes undue prominence to be given a particular item of evidence, is improper.

Richelieu etc. Nav. Co. v. Boston Marine and Ins. Co. 136 U. S. 408, 423;
Hickory vs. U. S. 160 U. S. 408.

"DEFENDANT'S INSTRUCTION NO. 4 (R. 150)", REFUSED.

This instruction is bad and the Court properly refused it for the following reasons:

1. It entirely ignores the rider attached to the original policy permitting the use of gasoline.

2. It would tell the jury that the said policy was forfeited by keeping or using of gasoline upon said premises, when as a matter of fact, said policy does not provide for a forfeiture in any event.

3. It would tell the jury that the Insurance Company was not liable for loss, even though a stranger or a trespasser was keeping, using or allowing gasoline upon the insured premises without the knowledge or notice of its presence by the respondent or her agent, Charles F. Bachmann.

4. Said instruction is contrary to the issues raised in its specifications of defense.

PETITIONER'S INSTRUCTION NO. 6 (R. 150) REFUSED.

This instruction is bad for the following reasons:

1. It entirely ignores the rider attached to the original policy permitting the use of gasoline.

2. It incorporates in said instruction alleged facts upon which there is not a scintilla of evidence, to-wit: That the petitioner would not be liable though neither the respondent nor her husband had any interest in said stills and though they had not in any way whatever participated in the purchase, use or operation thereof.

3. This instruction is bad not only because it singles out certain facts but it actually assumes facts upon which there is no evidence to support, and facts which the petitioner does not even suggest as existing nor attempts to prove.

The record may be searched from beginning to end and it will not show any fact or circumstance from which any inference can be drawn that the respondent or her husband had any interest in said stills "or, had in any way, whatever, participated in the purchase, use or operation thereof."

Petitioner, in its brief, complains that the refusal of its Instruction No. 6, coupled with the granting of Respondent's Instructions Nos. 1 and 2, requires the petitioner to establish its specifications of defense by showing actual knowledge on the part of the respondent or her agent, of the operation of the stills. It is necessary by the terms of the policy itself to show that the respondent had actual knowledge or control of any

alleged increased fire hazard. Actual knowledge is divided into two classes, express and implied. Bouvier Law Dictionary, Vol II, P. 515. Plainly this is what the Court means by the terms "actual knowledge."

DEFENDANT'S INSTRUCTION NO. 7 (R. 151) REFUSED

Petitioner's Instruction No. 7 given, tells the jury that it was not incumbent upon the petitioner to prove beyond a reasonable doubt that the respondent or her husband, Charles F. Bachmann, had knowledge or notice of any condition prevailing in the insured building as alleged in petitioner's specifications of defense, at and prior to the time of the fire, which may have increased the fire hazard to the insured premises. The word "notice" as used in petitioner's instruction No. 7 is very comprehensive and applies to issues raised and evidence adduced.

"Notice" as used in petitioner's instruction No. 7, in connection with the word "knowledge" means that information given of some act done or the interpellation by which some act is required to be done, and includes actual or constructive notice. In every instruction granted, either on behalf of the petitioner or the respondent, the Court permits the extending of constructive notice to the plaintiff, by imputing notice or knowledge of her agent, Charles F. Bachmann, to her. Petitioner's Instruction No. 2 granted, especially contains this provision.

Petitioner complains in its brief because the Court below did not properly define to the jury the meaning of the words "within the control or knowledge of the insured," as used in the Increase of Hazard warranty.

There was no request made by the petitioner for the interpretation of these words by the Court, nor was any such assignment of error made, on motion for new trial.

(f) SUMMARY OF PETITIONER'S EXCEPTIONS TO COURT'S RULING IN REFUSING TO GRANT ITS INSTRUCTIONS HEREINBEFORE MENTIONED.

First. Petitioner's refused instructions predicated on an increase of fire hazard tell the jury that notice or knowledge of such increase of fire hazard on the part of respondent, or her agent, Charles F. Bachmann, was NOT NECESSARY OR ESSENTIAL; while Petitioner's Specification of Defense with reference to the same subject matter, i. e., increase of fire hazard (R. 12) charged and averred full notice and knowledge to respondent and/or her agent, Charles F. Bachmann, of such increase of fire hazard, besides the policy itself requires that it be within control and knowledge of the insured. The petitioner has no right to mislead the Court or counsel in its pleadings; nor has it any right to depart from its pleadings after the testimony is all in.

Second. With reference to the presence of gasoline, mash, etc., on the insured premises, the Petitioner's Specifications of Defense under the title "Conditions and Warranty" charges the presence of gasoline, mash, etc., on the insured premises, "all of which was well known to respondent and her agent or agents." Petitioner's refused instructions are predicated upon the proposition that it mattered not whether the respondent or her agents had any knowledge whatever concern-

ing such condition; again departing from the petitioner's pleading upon which it depended to evade or absolve itself from liability.

Third. The insured premises originally carried a certain percentage of risk and fire hazard. An increase of risk was contemplated and was permitted by the "rider" issued and attached to the face of the policy. The evidence shows that gasoline was used by means of a "hot plate" under the permission and authority of said rider; and that hot plates were found in the building after the fire; therefore, ignoring and failing to recognize or mention the use of gasoline by a hot plate in petitioner's instructions, practically a controlling feature of the case, made all the instructions bad.

Fourth. Practically every instruction which calls upon the jury to determine some phase based upon the evidence, facts and circumstances of the case, there is no testimony to support the theory set forth in the denied instructions.

Fifth. The defenses of the petitioner as expressed and described in its Specifications of Defense have been fully covered by Instructions Nos. 2, 5 and 7. No. 7 is particularly called to the Court's attention, and especially in view of the refusal of the petitioner's Instruction No. 6. While No. 6 speaks of the stills increasing the fire hazard whether by explosion or otherwise, and whether the respondent or her agent knew or had reasonable cause to believe or know of the existing condition, petitioner's No. 7 which was allowed goes far beyond No. 6. No. 7 covers the entire field of defense in using the language "had knowledge or NOTICE of any condition prevailing in the insured building, as alleged in Petitioner's Specification of Defense, at and prior to the time of the fire which may

have increased the fire hazard in the insured premises." No. 7, therefore, included within its scope "Petitioner's Specifications of Defense" in their entirety.

(g) OTHER ASSIGNMENTS OF ERROR.

A reference to petitioner's brief page 20, under "Specifications of errors to be urged," it will be seen that petitioner abandons all other errors urged by it in the Circuit Court of Appeals.

(h) CASES RELIED ON BY PETITIONER DISTINGUISHED FROM CASE AT BAR

The cases of Liverpool and London and Globe Ins. Co., vs. Gunther, 116, U. S. 113, and Gunther vs. Liverpool and London and Globe Ins. Co., 134 U. S. 110 are distinguishable from the case at bar (1) both in respect to the respective provisions of the policy relating to the keeping, storing and using of gasoline and as to the facts proved; (2) the Gunther case, also, is distinguishable from the case at bar as to the issues raised by the pleadings and determined by the jury; (3) in the Gunther case, the insurance company, as in the case at bar, admitted the execution of the policy and the fact of the destruction by fire of the insured premises, and denied generally all the allegations of the complaint, not expressly admitted or otherwise controverted in the answer, and for a separate and distinct answer to the causes of action alleged in the complaint, in addition to the general denial above referred to, alleged and set out warranty contained in the policy, which warranty provided that "if the assured shall keep gunpowder, . . . gasoline, benzine,

benzole, . . . or any burning fluid, . . . without written permission in this policy, then and in every such case, this policy shall be void", and further provided that none of the above mentioned prohibited articles were to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with the written permission endorsed on the policy, "excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." Then there follows an allegation of the breach of said warranty in the following words:

"And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiff, among other things, in that without written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises mentioned and described in said policies, benzine or benzole, or other inflammable fluids or liquids, prohibited by said policies, and defendant avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, keeping, and allowing of such prohibited articles on said insured premises, and defendant avers that it is advised and believes that, by reason of the premises, the policies became and were null and void."

"Each of the two policies, after the description of the premises insured, contained the following clause: 'Privilege to use gasoline, gas, gasometer, blower and generator being underground about 60 feet from main building, in vault; no heat employed in process'."

(4) In the Gunther case, the prohibited warranty clause provided against the storing, using or keeping of gasoline on the premises TEMPORARILY or permanently,—in the case at bar, there is no provision against taking gasoline upon the premises TEMPORARILY and the keeping of it is permitted by the rider; (5) in the Gunther case, the policy provides that if any of the prohibited articles are stored, kept, used or allowed upon the premises, the policy shall be void,—in the case at bar, even the original policy does not provide that using, storing or keeping of any of the prohibited articles mentioned shall render the policy void, but that the company shall be not liable for loss or damages occurring while any of the prohibited articles are kept, used or allowed upon the insured premises; (6) in the Gunther case, the policy did not provide for suspension of the operation of the policy, or for the avoiding of it, because of an increase of the fire hazard by any means within the control or knowledge of the assured,—in the case at bar, the policy contained such a provision; (7) in the Gunther case, the insurance company averred that the using, keeping and allowing on the insured premises described in the policy, of the prohibited articles, the policies became void, but did not allege that the keeping of said prohibited articles was within the knowledge and control of the insured as is alleged in the case at bar; (8) in the Gunther case, the court says that the allegations of the answer were not so definite and certain as might have been required, upon motion made in due time, and that there was some obscurity in pleading the defense but whatever obscurity there was, consideration apart from the facts subsequently disclosed in the evidence that all the testimony necessary to its establishment was offered

and admitted without objection and that, therefore, the assured was not misled by said pleading, in any event, that if Gunther had desired more specific pleading, he should have made timely objection to the answer filed by the insurance company,—in the case at bar, the insurance company sets up in its specifications of defense that at the time of the fire complained of, and prior thereto, large quantities of gasoline and other explosives were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff below and her agent or agents, and was in violation of the conditions and warranty contained in said policy. (R. p. 14), and upon the pleadings tendered and filed on behalf of the insurance company, the court below based all of the instructions given to the jury and, also, permitted certain evidence to be introduced on behalf of both plaintiff and defendant, and refused to permit certain other testimony to be admitted (R. p. 141); (9) in the Gunther case, there was no question about the gasoline being kept upon the insured premises,—in the case at bar, the keeping or using of gasoline is contradicted by a great many witnesses and by surrounding facts and circumstances; (10) in the Gunther case, the evidence clearly showed that the manager of the hotel was in no sense a stranger or a trespasser, while in the case at bar, the evidence does not show clearly by whom the gasoline was kept, used or allowed upon the premises, if at all, but from the testimony of W. L. Smith, offered by the insurance company, it would seem that there were no stills, gasoline or other prohibited articles upon the insured premises a short time prior to the fire; (11) in the Gunther case, the use of gasoline was restricted and limited to the use thereof for fuel, which was to be

kept in a place and manner specifically prescribed,—in the case at bar under the rider, clause (d) contained in the original policy prohibiting the use of gasoline on said premises is materially changed so as to permit the use of gasoline for any purpose that would not increase the fire hazard with the consent or knowledge of respondent.

There are a great many other distinctions between the Gunther case and the case at bar, but we deem the above sufficient to clearly distinguish the two cases.

The case of Miller vs. Union Assurance Society, 39 Fed. (2d 25) cited by the petitioner in its brief at pages 22, 24, 26, 28, 44 and 62, was a suit in Equity for recovery from the owner of the building under and by virtue of an assignment of the interest of the mortgagor to said Insurance Company and for decree of foreclosure under said mortgage against the property of the insured. In that case the policy reserved to the occupant the right to use "the premises as is usual and incidental in the business as conducted thereon when not in violation of any law."

In the case at bar, there is no provision against conducting an unlawful business either in the original policy or in Form No. 4, Substituted Form (commonly called a "rider"). (R. 3.) In the Miller case, the Court of Equity held that the insured had knowledge of the increase in the fire hazard. In the case at bar, this question is submitted to the jury under both respondent's instructions and petitioner's instructions Nos. 2, 5 and 7, and the jury decided the fact as to whether respondent or her agent had knowledge adversely to the petitioner. In the Miller case the Court sitting as a Court of Equity, found the fire hazard was increased with the knowledge and control of the in-

sured. In the case at bar, the jury found that the fire hazard was not increased within the knowledge and control of the respondent or her agent.

Furthermore, the "work and materials clause" in the Miller case very materially differs from the "work and materials clause" in the present case. In the Miller case, the "work and materials clause" reserved to the occupant the right to use

> "the premises as is usual and incidental to the business . . . as conducted therein . . . WHEN NOT IN VIOLATION OF ANY LAW." (Caps ours.) MILLER v. UNION ASSURANCE SOCIETY, 39 Fed. (2) 25, p. 30.

The "work and materials clause" in the present case contained no provision RELATIVE TO THE VIOLATION OF ANY LAW. This clause, in the present case, is as follows:

> "And FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such materials as are usual in such occupancies." (R. p. 3.) (Caps ours.)

The Miller case held that the storing and using of gasoline on the premises could not be justified or excused under the "work and materials clause" in that policy, because this clause in the policy contained a provision that the business conducted on the premises WAS NOT TO BE IN VIOLATION OF ANY LAW.

The court said in the Miller case, 39 Fed. (2) 25 on page 30:

"obviously and admittedly, the materials were used in violation of law as the premises were being used not only to violate the prohibitory laws of the Government but the revenue law as well."

If a fire insurance policy contains no express prohibition of illegal use such use by a tenant without the knowledge or consent of insured will not violate the policy.

BEHLER v. GERMAN MUTUAL FIRE INS. CO. 68 Ind 347.

MARTIN v. CAPITOL INSURANCE CO. 85 Ia. 643, 52 N. W. 534.

NEBRASKA INSURANCE CO. v. CHRISTENSEN 29 NEB. 572, 45 N. W. 924.

There being an express prohibition of illegal use in the "work and materials clause" in the Miller case, and no express prohibition of illegal use in the "work and materials clause" in the present case, it can very readily be seen that there is no conflict between the decision of the Circuit Court of Appeals of the Eighth Circuit in the Miller case and the decision of the Fourth Circuit Court of Appeals in the present case.

CONCLUSION

We respectfully submit in conclusion that the petitioner, the defendant below, had a fair trial and that the case was fairly and properly presented to the jury for its consideration upon the issues joined, and the instructions of the Court which were eminently proper.

The jury found for the respondent, the plaintiff below, and judgment was accordingly rendered on the verdict as found. On appeal to the Circuit Court of Appeals (4th Circuit), the judgment of the lower Court was affirmed. We respectfully submit that for the reasons hereinbefore set out, that the judgment of the Circuit Court of Appeals should be affirmed.

CARL G. BACHMANN,
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Counsel for Respondent.

Wheeling, W. Va.

SUPREME COURT OF THE UNITED STATES.

No. 311.—October Term, 1931.

St. Paul Fire & Marine Insurance Co., Petitioner, *vs.* Sophia C. Bachmann. | On Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[February 23, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

This action to recover on a policy of fire insurance was brought in the federal court for northern West Virginia by Sophia C. Bachmann, a citizen of that State, against the St. Paul Fire & Marine Insurance Company, a Minnesota corporation. The parties stipulated that the plaintiff was entitled to recover "unless the policy had been forfeited and nullified by the alleged violations as set forth in defendant's Specifications of Defense Nos. 1 and 2 filed in this case." The first specification recited the Increase of Hazard Warranty: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured"; and alleged that by means "within the knowledge and control of the plaintiff and her agent or agents" the fire hazard had been increased. The second specification of defense recited the Prohibited Articles Warranty: "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while . . . there is kept, used or allowed on the described premises . . . gasoline . . ."; and alleged that "at the time of the fire complained of, and prior thereto, large quantities of gasoline were being kept . . . upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty."

To each defense the plaintiff replied that the warranty recited had been modified by a rider added to the policy; and also that prior to the fire she had no knowledge or control, as alleged, of the

circumstances relied upon as showing breach of the warranty. The rider set forth in the reply altered the occupancy clause of the policy, which had originally described the insured building as "occupied as Produce Store", so that it read, "occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous." Another clause of the policy permitted the insured "for present and other occupancies not more hazardous" "to do such work and to keep and use such materials as are usual in such occupancies;" and a rule of the West Virginia Fire Underwriters' Association (concededly a part of the insurance contract) provides that "the word 'materials' as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." Gasoline is used in the business of bottling automobile oils.

The case was tried before a jury. The defendant introduced evidence tending to show that the premises were occupied at the time of the fire by a tenant engaged in the illegal manufacture of intoxicating liquors; and that a large quantity of gasoline was kept on the premises for use in that connection. But it failed in its effort to prove that the plaintiff had knowledge of these facts. The verdict was for the plaintiff; and the judgment entered thereon was affirmed by the Circuit Court of Appeals. 49 F. (2d) 158. The writ of certiorari was granted because of alleged conflict with decisions of this Court and of the Eighth Circuit Court of Appeals, 284 U. S. — —.

The only error assigned here by the Insurance Company relates to the construction of the Prohibited Articles Warranty, and to the Circuit Court of Appeals' approval of the trial court's instructions with reference thereto. It is contended that under that warranty, even as modified by the rider, the presence of gasoline in connection with the use of the premises for the illegal manufacture of intoxicating liquors was an absolute bar to liability, regardless of the plaintiff's knowledge or control of the conditions; and that the trial court, in instructing the jury that the defendant must establish the fact of such knowledge and control, confused the requirements of the Prohibited Articles Warranty with those of the Increase of Hazard Warranty, and in effect read the condition against the use of gasoline out of the policy.

In passing upon this contention, the Circuit Court of Appeals said:

"At the time of the inspection by the agent of the insurance company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the insurance company saw that gasoline was being stored in the building. It was contended at the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the prohibited articles warranty, and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the increased hazard class. The trial court took this view of the case, and we think properly so. The agent of the insurance company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the insurance company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent."

In so holding the court was in error. Because of the terms of the rider, a determination of the hazard involved was essential to maintaining the defense under the Prohibited Articles Warranty as well as that under the Increase of Hazard Warranty. But the two warranties are distinct. The latter is not violated unless there is increase of hazard within the knowledge and control of the insured. The former may be violated if a tenant keeps the prohibited article on the premises, even if this was done without the knowledge and control of the insured. *Liverpool & London Insurance Co.* v. *Gunther*, 116 U. S. 113, 128, 129; *Gunther* v. *Liverpool & London & Globe Insurance Co.*, 134 U. S. 110, 116. Compare *Imperial Fire Insurance Co.* v. *Coos County*, 151 U. S. 452, 463, 464. The rider attached to the policy altered the prohibition against gasoline only to the extent of permitting it to be kept and used for the purpose of bottling automobile oils, or for "other mercantile purposes not more hazardous." The court could not say as a matter of law whether the business of operating moonshine stills was or was not more hazardous than that of bottling automobile oils. Compare *Royal Exch. Assur. of London* v. *Thrower*, 246 Fed. 768, 772; *Phoenix Assur. Co.* v. *Franklin Brass Co.*, 58 Fed. 166, 171; *Schaffer* v. *Hampton Insurance Co.*, 235 N. W. 618.

If it was more hazardous, the presence of the gasoline constituted a violation of the warranty. The question should have been submitted to the jury.

It is urged on behalf of the respondent that the Insurance Company is not in a position to complain of this error. Stress is laid on the circumstance that in its specifications of defense the Company alleged knowledge and control by the insured of the presence of the gasoline and the operation of the stills; and it is argued that the parties are bound by the issue as thus joined. But the pleading set forth the Prohibited Articles Warranty and asserted a defense under it. Any additional matter, which might by implication be read as an attempted construction of the warranty, is to be regarded as surplusage. Compare *Lawrence* v. *Hyde*, 77 W. Va. 639, 643; *Lohr* v. *Wolfe*, 71 W. Va. 627, 628; *Jones* v. *Sanitary District of Chicago*, 265 Ill. 98, 100, 101; *Hall* v. *Spalding*, 42 N. H. 259, 262. When the defendant later sought instructions that proof of knowledge and control by the insured was not essential to establishment of the defense, the plaintiff made no effort to show that it had been prejudiced.

A more serious difficulty is that the defendant did not itself seek proper instructions. The burden was upon it to prove that the occupancy was not one to which the gasoline permit extended. Compare *Logan* v. *Provident Savings Life Assurance Society*, 57 W. Va. 384, 390. Yet it presented no request that the jury be instructed as to the meaning of the rider. Nor did it request an instruction that the jury find whether the occupancy at or before the time of the fire was more hazardous than that of bottling automobile oils. Its request was merely that the jury be charged that the plaintiff could not recover if at and prior to the time of the fire substantial quantities of gasoline were being kept on the premises "either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy." Thus, it requested the court to hold as a matter of law that operating moonshine stills was outside the scope of the permitted occupancies. The court could not take judicial notice that the operation of the stills was more hazardous than bottling automobile oils or say that it was not a mercantile purpose.

But the defendant's failure to ask proper instructions does not cure the error in the instructions which were given, and excepted

to. Compare *Texas & Pacific Ry. Co.* v. *Volk,* 151 U. S. 73, 78. At the plaintiff's request the trial judge charged that "unless the plaintiff . . . had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation . . . constitute no defense"; that "the defendant by the issuance of the rider . . . is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline." These instructions, while correct insofar as they bore upon the defense under the Increase of Hazard Warranty, were erroneous in respect to that under the Prohibited Articles Warranty. The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first. Compare *Westchester Fire Ins. Co.* v. *Fitzpatrick,* 2 F. (2d) 651, 654; *Sutherland* v. *Payne,* 274 Fed. 360, 361; *Rothe* v. *Pennsylvania Co.,* 195 Fed. 21, 25; *Audubon Bldg. Co.* v. *F. M. Andrews & Co.,* 187 Fed. 254, 260. We are constrained to reverse the judgment of the Circuit Court of Appeals, with directions that the case be remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice McReynolds thinks the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.